Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

JOHN J. KORESKO, V; REGIONAL EMPLOYERS'; ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC.; AND KORESKO & ASSOCIATES,

Petitioners,

v.

ELAINE L .CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX
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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos 04-3614, 05-1440,
05-1946 and 05-2673

ELAINE L. CHAO, Secretary of Labor,
United States Department of Labor

v.

JOHN J. KORESKO; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC.; KORESKO & ASSOCIATES,

Appellants

Appeals from the United States District Court for Eastern District of Pennsylvania (D.C. Misc. No. 04-mc-00074)
District Judge: Honorable Mary A. McLaughlin

Argued September 29, 2005

Before: RENDELL, FUENTES and WEIS, Circuit Judges.

(Filed: October 12, 2005)

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OPINION OF THE COURT

RENDELL, Circuit Judge.

John J. Koresko, V ("Koresko"), Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Service, Inc. ("Penn Mont"), and Koresko & Associates (together, "Respondents"), appeal two sets of orders issued by the District Court. In the first set of orders, the " enforcement orders," the District Court granted the Department of Labor ("DOL")'s Petition to Enforce Administrative Subpoenas ("May 11 Order"), rejected Respondents' privi-

lege claims and ordered Respondents to comply with the subpoenas ("August 23 Order"). The second set of orders, the "contempt orders," denied DOL's Renewed Motion for Adjudication of Contempt ("January 10 Order"), adjudged Respondents Koresko, Penn-Mont and Koresko & Associates (the "Contempt Respondents") in contempt, ordered them to pay compensatory costs and coercive fines ("March 17 Orders"), and directed the Contempt Respondents to pay $5,312.50 to DOL in compensation for fees and costs associated with the contempt proceeding ("April 25 Order").

Respondents raise myriad issues on appeal. We address their arguments with respect to the enforcement orders and the contempt orders separately below. Because we conclude that none of Respondents' contentions rises to the level of legal error or abuse of the District Court's discretion, we will affirm all of the District Court's orders.

As we write solely for the parties, who are familiar with the facts and the procedural history of this case, we will discuss only the legal issues presented and related material facts.

I. The Enforcement Orders

The District Court had jurisdiction over the subpoena enforcement proceedings under section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, as made applicable by section 504 (c) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1134 (c), and section 502 (e)(1) of ERISA, 29 U.S.C. § 1132 (e)(1). District court orders enforcing administrative subpoenas are final and appealable under 28 U.S.C. § 1291 because "there is no ongoing judicial proceeding that would be delayed by an appeal." Univ. of

Med. & Dentistry of N.J. v. Corigan, 347 F.3d 57, 63 (3d Cir. 2003) (quoting In re Subpoena Duces Tecum, 228 F.3d 341, 346 (4th Cir. 2000)).

Respondents challenge both of the District Court's enforcement orders. First, they argue that District Court's grant of DOL's Petition to Enforce Administrative Subpoenas in its May 11 Order was improper. Second, they dispute the District Court's rejection of their privilege claims in its August 23 Order. We address each of these issues in turn.

A. The District Court's Order Enforcing the Administrative Subpoenas

We review a district court's order enforcing administrative subpoenas for abuse of discretion. FDIC v. Wentz, 55 F.3d 905, 908 (3d Cir. 1995). The procedure for enforcing administrative subpoenas is well established. First, the agency must demonstrate, through affidavits of its agents, that its subpoena meets the threshold requirements for enforcement, SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 128 (3d Cir. 1981) (en banc): "(1) the inquiry must be within the authority of the agency, (2) the demand for production must not be too indefinite, and (3) the information sought must be reasonably relevant to the authorized inquiry." United States v. Westinghouse Elec. Corp., 638 F.2d 570, 574 (3d Cir. 1980). "If the government makes this preliminary showing, the burden then shifts to the respondent to prove that enforcement of the subpoena would be improper . . . ." Wheeling-Pittsburg, 648 F.2d at 128. Enforcement of a subpoena is improper where it would amount to an abuse of the court's process. Powell v. United States, 379 U.S. 49, 58 (1964). "Such an abuse would take place if the [subpoena]

had been issued for an improper purpose, such s to harass the [respondent] or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." Id. After each party has had an opportunity to argue its position, the District Judge may direct further proceedings, including discovery, if she concludes that the record is inadequate to make a final decision. On the other hand, if the judge finds that the record is sufficient, she may grant or deny the petition for enforcement. At all times during this procedure, the respondent "bear[s] the initial burden of convincing the trial judge that the claimed abuse of process is not frivolous." Wheeling-Pittsburgh, 648 F.2d at 128.

Respondents raise three main objections to the District Court's enforcement of DOL's subpoenas. First, they argue that the District Court improperly relied on "conclusory" statements to find that the subpoenas satisfied the threshold enforcement criteria. Second, they contend that the District Court applied the wrong standard in evaluating their claim that DOL's investigation was improperly motivated. Third, they assert that the District Court erred in refusing to inquire into DOL's statutory authority to issue the subpoenas. As we explain below, we conclude that the District Court's grant of DOL's petition to enforce its subpoenas was proper in all respects.

In this case, DOL supported its Petition for Enforcement with a declaration from Investigator Bindu A. George, and the District Court found that the declaration satisfied DOL's obligation to establish that its subpoenas met the threshold requirements for enforcement. Chao v. Koresko, No. 04-MC-74, slip op. at 3 (E.D. Pa. May 11, 2004). Respondents

argue that the District Court improperly relied on the "conclusory" statements in Investigator George's declaration. As described above, however, our standard administrative subpoena enforcement procedure specifically contemplates that an agency will use affidavits or sworn declarations to satisfy its initial burden. See Wheeling-Pittsburgh, 648 F.2d at 128. Moreover, weighing the sufficiency of the parties' submissions is precisely the type of decision that is committed to the District Court's discretion. Although we wonder how DOL could possibly need all of the documents it has listed in its subpoenas, we find no basis for concluding that the District Court abused its discretion in this first phase of the enforcement analysis. [1]

In the second phase of its enforcement analysis, the District Court evaluated Respondents claims that DOL was improperly motivated and concluded that, even assuming the facts that Respondents alleged were true, Respondents had failed to meet their burden of establishing that DOL was acting in bad faith or for an improper purpose. Koresko, No. 04-MC-74, slip op. at 4-5. Respondents contend that the District Court erred by applying the standard from United States v. Aero Mayflower Transit Co., 831 F.2d 1142, 1145-47 (D.C. Cir. 1987), which held that a respondent had to show that the agency was acting in bad faith or for an improper purpose to overcome the agency's prima facie en-

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[1] Judge Weis considers the request for production of thousands of employee applications for insurance which include medical and personal information to be unduly burdensome and would deny DOL's requests as to those documents.

forcement showing, id. at 1145, rather than analyzing their claims under the framework that we laid out in Wheeling-Pittsburgh, which allows that a respondent might be able to establish that enforcement of a subpoena would abuse the court's process even where the respondent fails to demonstrate bad faith. 648 F. 2d at 125. Respondents' contention lacks merit. Even if we were to find that Wheeling Pittsburgh articulates a broader standard than Aero Mayflower, the outcome of the case would not change-the District Court has already determined that the facts alleged by Respondents do not meet the Wheeling-Pittsburgh standard. Although the District Court's analysis was framed in terms of "bad faith" and "improper purpose," the District Court compared the facts alleged by Respondents to those alleged in Wheeling-Pittsburgh on its way to finding that Respondents' claims were insufficiently troubling to warrant further investigation. See Koresko, No. 04-MC-74, slip op. at 5 ("Even assuming that the investigation was prompted by a complaint by SCM, that fact does not rise to the level of bad faith or improper purpose by the agency. See Securities and Exchange Commission v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 127 (3d Cir. 1981)."). Under these circumstances, we cannot find that the District Court abused its discretion in the second phase of the enforcement analysis.

Respondents' argument that the District Court erred by failing to inquire into DOL's jurisdiction to investigate Respondents is similarly unfounded. As the District Court properly pointed out, the agency is not required to establish jurisdiction as an element of its prima facie case. Koresko, No. 04-MC-74, slip op. at 3 (quoting Donovan v. Shaw, 668 F.3d 985, 989 (8th Cir. 1982). The case that Respondents cite

to support their position, EEOC v. Shell Oil Co., 466 U.S. 54 (1984), is inapposite here because it is based on Title VII. Title VII, unlike ERISA, requires a valid charge of discrimination as a prerequisite to an EEOC investigation. A case decided by the Court of Appeals for the Eighth Circuit considering a subpoena issued by DOL pursuant to ERISA provides a better comparison. The court there noted that "[i]t is well-settled that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute," Donovan, 668 F. 2d at 989 (citations omitted), and concluded that the district court's refusal to entertain the respondent's defense of lack of coverage under the statute was proper. Id. Similarly, here, the District Court found that DOL established a prima facie case for enforcement. Because coverage by the statute is not an element of DOL's prima facie case, and lack of coverage is not a defense to enforcement, the District Court's failure to inquire into DOL's jurisdiction to investigate Respondents was proper.

In sum, none of the issues that Respondents raise regarding the District Court's enforcement of DOL's subpoenas amounts to an abuse of discretion. We will accordingly affirm the District Court's May 11 Order.

B. Respondents' Privilege Claims

Respondents assert that many of the documents requested by DOL in its subpoenas are covered by various privileges. After reviewing Respondents' privilege log and various

"samples" of the allegedly privileged documents, the District Court rejected Respondents' privilege claims.[2] The Court expressed frustration with Respondents' submissions and concluded that they should not be allowed more time to support their claims. Chao v. Koresko, No. 04-MC-74, slip op. at 4 (E.D. Pa. Aug. 2, 2004). On appeal, Respondents contest the District Court's legal finding that the statutory tax preparer privilege does not apply to this dispute, the Court's factual findings as to the applicability of the attorney-client and other privileges to the requested documents, and the District Court's refusal to allow Respondents to supplement their initial privilege submission. We reject all of Respondents' arguments and conclude that the District Court's privilege decisions were proper.

Our review of the District Court's determinations as to the scope of asserted privileges is plenary. United States v. Liebman, 742 F.2d 807, 809 (3d Cir. 1984). We agree with the District Court's that the tax preparer privilege does not apply here. The language of the statute is clear-the "privilege" "may only be asserted in – (A) any noncriminal tax matter before the Internal Revenue Service; and (B) any noncriminal tax proceeding in Federal court brought by or against the United States." 26 U.S.C. § 7525 (a)(2) (empha-

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[2] The Court allowed limited redaction of law firm bills to delete attorney-client privileged or work product-protected information and insurance forms to protect personal health and medical information. Chao v. Koresko, No. 04-MC-74 (E.D. Pa. Aug. 23, 2004).

sis added). This case, a civil proceeding by DOL to enforce an administrative subpoena, is neither. Respondents' primary concern seems to be that DOL will share information it receives with the IRS, but they have not cited any authority that expands the tax preparer privilege beyond its express statutory limits. Because this proceeding is clearly outside of the statutory bounds of the tax preparer privilege, we conclude that the privilege is inapplicable here.

Determinations of the applicability of privileges to particular documents are committed to the District Judge's discretion. Rossi v. Standard Roofing, Inc., 156 F.3d 452, 477 n.16 (3d Cir. 1998). The burden rests upon the party who claims that requested documents are privileged to "describe the nature of the documents . . .in a matter that . . . will enable other parties to assess the applicability of the privilege or protection." Fed. R. Civ.P.26(b)(5). In this case, the District Court specifically found that Respondents had failed to carry that burden:

> [T]he respondents have not supported their claims with kind of specific information that is required. The Court cannot tell what documents the respondents claim are protected by what privilege[s], by whom the document was prepared, from whom and to whom it was sent, and why it is a privileged communication.

Koresko, No. 04-MC-74, slip op. at 4 (E.D. Pa. Aug. 2, 2004). Respondents have attempted to relitigate the privilege issues before us, explaining why they think that various privileges apply to various documents. Their arguments establish only that they disagree with the District Court's deci-

sion; they do not establish that the District Court's ruling was incorrect or that the Court abused its discretion in any way. We will not disturb that ruling.

Finally, Respondents argue that the District Court "should have" allowed them more time to clarify their privilege submissions and provide additional information. Like determinations of whether the privilege applies, decisions as to the amount of information that the District Court needs in order to make such determinations are committed to the District Judge' s discretion. Cf. Schwimmer v. United States, 232 F.3d 855, 863-64 (8th Cir. 1956) (finding that district court has "discretion or latitude in the receiving of proof" on questions of waiver of attorney-client privilege). The District Court in this case "spent hours" evaluating Respondents' privilege claims, Koresko, No. 04-MC-74, slip op. at 5 (Aug. 2, 2004), and allowed Respondents the opportunity to present their privilege claims both orally and in writing. Id. at 4. The Court concluded that Respondents were "unable. . .to state with any precision why any of the documents are privileged." Id. Given the circumstances, we find that the District Court acted well within its discretion when it declined to give Respondents a third opportunity to advance their privilege claims.

Because Respondents have failed to show that the District Court committed a legal error or abused its discretion with respect to the applicability of privilege to the subpoenaed documents, we will affirm the District Court's August 23 Order.

II. The Contempt Orders

Respondents challenge the District Court's March 17 contempt orders by arguing (1) that the Court lacked jurisdiction to enter the orders; (2) that the District Court violated Respondents' procedural due process rights in the contempt proceedings; (3) that the District Court erred in ignoring Respondents' defenses to the contempt charges; and (4) that the relief awarded by the District Court, in the form of compensatory costs and coercive fines, was improper. We address each argument in turn.

A. Jurisdiction

Respondents argue that the appeals that they filed from the District Court's May 11, August 23 and January 10 Orders divested the District Court of jurisdiction over further contempt proceedings. But the general rule on which Respondents rely, that filing a notice of appeal immediately transfers jurisdiction from a district court to a court of appeals, is subject to a number of exceptions that apply in this case. See generally 20 James Wm. Moore et al., Moore's Federal Practice § 303.32 [1] (3d ed. 1999). For example, the district court retains authority to enforce a judgment that has not been stayed. Id. § 303.32 [2][c][vi]. The District Court thus properly denied DOL's Motion for Adjudication of Civil Contempt on January 10, deferring enforcement of its May 11 and August 23 Orders until Respondents' Petitions for Rehearing and Rehearing En Banc of its stay application were denied. Chao v. Koresko, No. 04-MC-74 (E.D. Pa. Jan. 10, 2005). Once the stay was finally denied, the District Court retained jurisdiction to enforce its May 11 and August 23 orders.

Respondents' appeal of the District Court's January 10 Order did not divest the District Court of that jurisdiction. A district court may proceed with a case if an appeal is filed from a non-appealable order. 20 Moore's Federal Practice § 303.32 [2][b][iv][B]. "Civil contempt becomes appealable only when the contemnor has refused to comply with the remedial order and the court has exercised its authority either to punish or to coerce compliance." U.S. Steel Corp. v. Fraternal Ass'n of Steel Haulers, 601 F.2d 1269, 1273 (3d Cir. 1979). The District Court's January 10 Order was not appealable-it simply denied DOL's contempt motion and outlined the penalties for any future failures to comply with the Court's August 23 Order. As of January 10, then, the Court had not "exercised its authority either to punish or to coerce compliance." Thus, Respondents' appeal of the January 10 Order could not disturb the District Court's jurisdiction to enforce its May 11 and August 23 Orders. The District Court therefore retained jurisdiction to enter the March 17 Orders adjudging Respondents Koresko, Koresko & Associates and Penn-Mont in contempt.

B. Respondents' Procedural Due Process Arguments

Respondents contend that the District Court deprived them of their due process rights when it "prospectively" adjudged them in contempt in its January 10 Order and failed to give them adequate opportunity to explain in the hearings that led up to its March 17 Orders. Respondents rely on Newton v. A.C. & S., Inc., 918 F.2d 1121 (3d Cir. 1990), to support their due process theory. In that case, the district court issued an order providing for the imposition of fines if the parties failed to settle by a court-imposed deadline. Id. at 1124. When the parties failed to meet the deadline, the court

"summarily" and without a hearing imposed fines on defendants and defendants' counsel. Id. We reversed and instructed the district court to vacate the fines because the district court had failed to provide the parties with "customary procedural safeguards [to] ensure that the parties or their attorneys have an opportunity to explain the conduct deemed deficient before the fine is imposed and that a record will be available to facilitate appellate review." Id. at 1127.

The comparison of this case to Newton is inept. Whereas the district court in Newton imposed fines before any hearing, the District Court here provided Respondents with two opportunities to explain themselves, at hearings on January 7 and March 16, before it imposed any sanctions. Transcripts were made of those hearings and included in the record for appellate review. The due process standard that we articulated for contempt proceeding in Newton requires no more.

C. Respondents' Contempt Defenses

We review a district court's contempt findings for abuse of discretion. United States v. Sarbello, 985 F.2d 716, 725 (3d Cir. 1993). Abuse of discretion "may be established by showing an error of law or a clearly erroneous judgment or finding of fact." Id. Respondents have not challenged the merits of the District Court's contempt findings, so we will not review them here. Instead, Respondents argue that the District Court committed errors of law when it declined to consider Respondents' "substantial compliance" defense and rejected Respondents' offer to produce privileged documents with various protections. We disagree.

The District Court was under no obligation to consider Respondents' substantial compliance defense. As Respon-

dents themselves acknowledge, we have never recognized substantial compliance as a defense to civil contempt. See Robin Woods, Inc. v. Woods, 28 F.3d 396, 399 (3d Cir. 1994). Courts that have recognized this defense define it as follows:

> [S]ubstantial compliance with a court order is a defense to an action for civil contempt. If a violating party has taken "**all reasonable step**" to comply with the court order, **technical** or **inadvertent** violations of the order will not support a finding of civil contempt.

General Signal Corp. v. Donallco, Inc., 787 F.2d 1376, 1379 (9th Cir. 1986) (emphasis added) (citations omitted). We need not consider here whether we should recognize the substantial compliance defense in the future, because even if we were to recognize substantial compliance as a defense to contempt, it would not apply to Respondents. See Robin Woods, 28 F.3d at 399. Respondents' failure to disclose the documents in this case is neither "technical" nor "inadvertent." Respondents have acknowledged that they have documents responsive to the subpoena, but have repeatedly declined to produce them. Although they sincerely believe that some of the documents covered by the subpoenas are protected by privilege, that belief does not excuse their failure to comply with the District Court's order. "[G]ood faith is not a defense to civil contempt." Id.

Nor was the District court required to accept Respondents' offer to produce purportedly privileged documents with "protections." The District Court had already ruled on the merits of Respondents' privilege claims, and Respondents'

applications to stay the District Court's order to produce the documents had been denied both by the District Court and by us. The District Court was therefore free to enforce its order. Respondents' attempts to produce the documents in redacted or "protected" form amounts to nothing more than an attempt to relitigate the privilege issue and was therefore properly disregarded by the District Court. See United States v. Rylander, 460 U.S. 752, 756 (1983) ("[A] contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." (quoting Maggio v. Zeitz, 333 U.S. 56, 69 (1948)).

D. The Relief Awarded

The District Court ordered Respondents to pay $5,312.50 in compensation for attorney's fees (calculated at a rate of $250 per hour) and costs associated with filing DOL's contempt motion, Chao v. Koresko, No. 04-MC-74 (E.D. Pa. Apr. 25, 2005), and a coercive fine of $250 per day beginning January 26, 2005. Chao v. Koresko, No. 04-MC-74 (E.D. Pa. Mar. 17, 2005). Respondents argue that the District Court erred as a matter of law in both awards. First, they assert that the Court erroneously awarded DOL costs for motions that it lost and improperly assessed attorneys' fees for DOL's attorneys at a rate comparable to that billed by attorneys in private practice. Second, they argue that the coercive fine is "preempted" by ERISA. We review a district court's civil contempt sanctions for abuse of the court's "wide discretion in fashioning a remedy." Del. Valley Citizens' Council for Clean Air v. Pennsylvania, 678 F.2d 470, 478 (3d Cir. 1982).

The District Court's award of compensatory costs was proper. The final amount awarded included fees and costs associated with both the January 7 and March 16 hearings. Although it is true that the Court denied DOL's contempt motion after the January 7 hearing, it did so for a purely technical reason-because we had not yet denied Respondents' Petitions for Rehearing and Rehearing En Banc of its stay applications. When the District Court ultimately granted DOL's motion in its March 17 Orders, it relied on evidence adduced at both the January 7 and March 16 hearings. In addition, the District Court's April 25 Order indicates that Respondents failed to object to DOL's submissions supporting its request for attorneys' fees when they had the opportunity. Koresko, No. 04-MC-74 (E.D. Pa. Apr. 25, 2005). Respondents have thus failed to advance any basis for finding that the District Court abused its discretion in awarding fees and costs associated with both hearings. Nor have they established that the District Court's award of fees at the rate of $250 per hour was excessive. We have expressly authorized district courts to value government attorneys' time at market rates for the purpose of awarding sanctions. See Napier v. Thirty or More Unidentified Fed. Agents, Employees, or Officers, 855 F.2d 1080, 1092-93 (3d Cir. 1988). We will accordingly affirm the District Court's April 25 Order.

Respondents' argument that the District Court erred in ordering them to pay coercive fines is similarly unavailing. According to Respondents, the provision of ERISA that sets statutory penalties for the failure of "plan administrators" to produce information at DOL at $100 per day limited the District Court's authority to order coercive fines in its contempt

proceedings. See 29 U.S.C. § 1132 (c)(6). But the provision that Respondents cite speaks only to the authority of the Secretary of DOL to assess civil penalties against ERISA plan administrators; nowhere does it evince an intent to limit a district court's discretion to fashion appropriate remedies in contempt proceedings. We conclude that the $250 per day fine imposed by the District court in this case was well within the District Court's discretion.

Because none of the arguments that Respondents raise on appeal demonstrates that the District Court abused its discretion or committed legal error during the enforcement or contempt proceedings, we will affirm the District Court's May 11 and August 23 Orders enforcing DOL's subpoenas and the District Court's March 17 and April 25 Orders adjudging Respondents Koresko, Koresko & Associates and Penn-Mont in contempt and ordering them to pay coercive fines and compensatory costs.

APPENDIX B – ORDER OF DECEMBER 20, 2005 DENYING HEARING EN BANC

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 04-3614, 05-1440,
05-1946 and 05-2673

ELAINE L. CHAO, Secretary of Labor, United States Department of Labor

v.

JOHN J. KORESKO; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC.; KORESKO & ASSOCIATES,

Appellants

Appeals from the United States District Court for the Eastern District of Pennsylvania (D.C. Misc. No. 04-mc-00074) District Judge: Honorable Mary A. Mclaughlin

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Present; SCIRICA, Chief Judge, SLOVITER, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, and WEIS*, Circuit Judges.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

* Honorable Joseph F. Weis, Jr., Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel rehearing.

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ Marjorie O. Rendell

Circuit Judge

Dated: December 20, 2005
CRG/cc: Virginia L. Miller, Esq.
Gail Perry, Esq.

APPENDIX C – TRANSCRIPTS, DATED JANUARY 23, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ELAINE L. CHAO,	)	
Plaintiffs,	)	Case No. 04-MC-74 & 05-MC-18
	)	Philadelphia, PA
	)	
vs.	)	January 23, 2006
	)	
JOHN KORESKO, et al.,	)	
Defendants.	)	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE
MARY A. MCLAUGHLIN
UNITED STATES DISTRICT COURT JUDGE

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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

(Appearances continued)

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(Court in session)

THE CLERK: Court is now in session, the Honorable Mary A. McLaughlin presiding.

THE COURT: Good morning, everyone.

AN ATTORNEY: Good morning, Your Honor.

AN ATTORNEY: Good morning, Your Honor.

THE COURT: Please be seated. All right. We are here this morning in the case of two miscellaneous matters filed by the Secretary of Labor. The secretary filed these matters to enforce certain administrative subpoenas against a variety of people, but the one case is against Koresko & Associates, and the second case, Community Trust Company.

All right, everybody. Let me see if I know everybody who's here. Is this Mr. -- Mr. Gottlieb.

MR. GOTTLIEB: Yes. Good morning, Your Honor.

THE COURT: Are you -- good morning to you, sir. And is this Mr. Koresko seated next to you?

MR. GOTTLIEB: Yes, it is, Your Honor.

THE COURT: Good morning to you, sir. And Mr. Gates? Where is Mr. Gates? Yes. I was going to say I -- the next gentleman didn't appear to be you. Good morning, Mr. Gates. And who are you, sir?

MR. FRANKEL: Mr. Frankel.

THE COURT: You want to rise, sir –

MR. FRANKEL: Yes.

THE COURT: -- when you address the Court? You are Robert Frankel?

MR. FRANKEL: Yes, Your Honor.

THE COURT: And what is your position?

MR. FRANKEL: I'm a partner at Anderson, Kiel.

THE COURT: Okay. So you're representing Mr. Koresko.

MR. FRANKEL: Yes.

THE COURT: Okay. That's fine. Glad to have you. And this is Ms. Susan Russell. I remember Ms. Russell, and who's seated next to her?

MR. DUNPHY: Your Honor, Nick Dunphy, a board member for Community Trust.

THE COURT: All right. Thank you very much for coming. Appreciate your being here. Ms. Roller I know. Mr. Neely I remember.

MR. NEELY: Yes, Your Honor.

THE COURT: Good morning to both of you.

MS. ROLLER: Good morning.

THE COURT: And who's seated next to Ms. Roller?

MS. THOMASSON: Linda Thomasson.

THE COURT: Good morning to you, ma'am.

MS. BEARD: I'm Ellen Beard, appellate counsel from the Labor Department.

THE COURT: Thank you very much for coming in. Ms. Beard, you're appellate counsel, and Ms. Thomasson, what's your position, ma'am.

MS. THOMASSON: Counsel before the District Court.

THE COURT: Before the District Court. Okay. Thanks everybody for being here. Appreciate it.

All right. We are here, of course, today on the Secretary of Labor's renewed motion for incarceration of Mr. Koresko, and I guess technically, Mr. Neely, you moved with respect to Community Trust Company as to Ms. Susan Russell.

MR. NEELY: Yes, Your Honor. That's correct. So we have two motions before you.

THE COURT: All right. And why don't you tell me how you'd like to proceed, Mr. Neely.

MR. NEELY: Yes, Your Honor. As you know, we have two motions before you, Koresko, Koresko & Associates and PennMont have been in contempt of your court orders since March 17, 2005, and Community Trust -- Trust has been in contempt of your validly issued orders since September 26, 2005.

There is no dispute, Your Honor, that these respondents have not produced the documents that your orders have required them to produce, and at this point, it's respondent's burden as the secretary sees it for these respondents to show cause why they should no be incarcerated.

THE COURT: All right. Well, I -- let me stop for a minute and ask Ms. Beard to fill us in, because when we were here last, it was just Mr. Gates was here on behalf of Community Trust Company and was telling me about the status of the appeal of the Community Trust Company. Obviously, the appeal as to Mr. Koresko and Koresko & Associates is finished at this point, correct, Mr. Gottlieb?

MR. GOTTLIEB: Not exactly, Your Honor. There is a motion to recall the mandate in the Third Circuit which has not been ruled upon yet which the Department of Labor has -- has responded to. So at this juncture as we -- as we sit here today, this Court has jurisdiction over the matter. However, it's our intention to file a writ of certiorari with the Supreme Court with regard to the issues that were in the Third Circuit.

So while this Court certainly has jurisdiction, there is a motion to recall the mandate.

THE COURT: Just remind me, what's a motion to recall the mandate?

MR. GOTTLIEB: Well, I found that out too, Your Honor, because I never really was familiar with that term. But after the panel rejected our motion, the file was mandated or send back on December 28th –

THE COURT: Right.

MR. GOTTLIEB: -- to this Court, and the proper -- and therefore, this Court has jurisdiction at that point over -- over this case. So we filed a motion to recall the mandate, and if that motion is granted, a motion to stay the mandate in order to give us an opportunity to fully pursue our appellate rights which we strongly believe we have the right to do so.

THE COURT: But when you say your appellate rights, before the United States Court of Appeals for the Third Circuit or --

MR. GOTTLIEB: Yes.

THE COURT: -- or the Supreme Court.

MR. GATES: To file a writ of -- no. To file a write of certiorari with the U.S. Supreme Court –

THE COURT: To the Supreme Court. Okay.

MR. GOTTLIEB: -- and have the Supreme Court make the determination whether or not it wishes to review the matter or not.

THE COURT: Okay. But technically, that's a write of cert, not an appeal, right?

MR. GOTTLIEB: Yes.

THE COURT: Yeah. Because an appeal, of course, is usually by right.

MR. GOTTLIEB: Yes.

THE COURT: Okay. Ms. Beard, can you fill me in, ma'am, on where we are on both -- do you know about both appeals? Have you been appellate counsel in both?

MS. BEARD: Yes. I've been involved in both, Your Honor.

THE COURT: Okay.

MS. BEARD: In -- in Mr. Koresko's case, yes. The Court of Appeals issued its mandate December 28th returning –

THE COURT: Right.

MS. BEARD: -- jurisdiction to this Court, and I think three things have been filed since then. The -- on January 9th, the -- Koresko filed an emergency motion to recall and stay the mandate, and we have responded to that. As of Friday afternoon, it was still pending in the Third Circuit. I do not expect it to be granted. One –

THE COURT: What -- can I just interrupt you for a moment though? Can you just fill me in as an appellate lawyer? What's the basis for that? What does that mean, to recall the mandate?

MS. BEARD: It's a very extraordinary remedy that is very rarely used, and it means that -- that the Third Circuit would be taking jurisdiction back away from you, but the Supreme Court has said that it's an abuse of discretion -- it was an abuse of discretion in one case for the Ninth Circuit to recall its mandate in order to stay sentence of execution. So it's very rarely issued.

THE COURT: Okay.

MS. BEARD: I mean, it's extremely extraordinary.

THE COURT: Yes. I don't think I had ever heard of that, but go ahead, ma'am.

MS. BEARD: Then Mr. Koresko filed a pro se petition for a write of mandamus with –

THE COURT: I saw that.

MS. BEARD: -- the Third Circuit the end of last week which they denied on Friday.

THE COURT: Uh-huh.

MS. BEARD: And I was just informed this morning that he has filed some sort of a motion with the Supreme Court over the weekend which –

THE COURT: I did get a copy of that this morning.

MS. BEARD: I haven't seen it, but –

THE COURT: Emergency motion –

MS. BEARD: I believe you still have jurisdiction.

THE COURT: -- of petitioner.

MS. BEARD: In fact, the Third Circuit said when it denied the -- the mandamus petition that the hearing should go forward as scheduled.

THE COURT: Right.

MS. BEARD: That was in the order.

THE COURT: Uh-huh.

MS. BEARD: So that's -- that's the Koresko case CTC, there have been two appeals. The first appeal was docketed last June, and it's been fully briefed but has not

been argued, and that was the appeal from the subpoena enforcement order or orders.

The second appeal was docketed October 31st. It has not -- it has not yet been fully briefed. The secretary filed a motion to consolidate the two appeals, expedite, and submit them on the briefs the end of November, and in late December, the Court consolidated the two appeals for disposition only, and then January 11th, the Third Circuit issued an order granting the motion to expedite and setting a briefing schedule for the second appeal.

So CTC's opening brief was filed on January 13th. Our brief is due on January 31st. CTC's reply brief is due on February 10th, but as I understand it, nothing has been stayed. Earlier the -- the Third Circuit denied a request for a stay from the first –

THE COURT: Right.

MS. BEARD: -- set of orders, and no one has stayed the contempt proceedings to my knowledge.

THE COURT: All right. And the second CTC appeal is of the Court's order holding CTC in contempt?

MS. BEARD: Yes, it is.

THE COURT: All right.

MR. GOTTLIEB: Your Honor -- I'm sorry.

THE COURT: Thank you, Ms. Beard.

MR. GOTTLIEB: May I briefly just respond –

THE COURT: Sure.

MR. GOTTLIEB: -- if I may? First of all, on the issue of the mandate, counsel did a little bit more than just inform you of the status. Some of that was advocacy on her part, predicting that the Third Circuit is going to reject our -- our request.

We believe very strongly that there are extraordinary circumstances here and that while the case may not be moot in the classic sense of the word if Mr. Koresko were incarcerated, certainly, his appellate rights would be -- would be eroded if not eviscerated if he was faced with a choice of either turning over the documents or remaining in jail, and so we believe extraordinary circumstances do exist. I know counsel cited that case, but it's going to be up to the wisdom of the Third Circuit whether or not to recall the mandate.

Secondly, I did find out this morning that Mr. Koresko pro se did file a -- a motion for stay. I think it's with Justice Suder, Associate Justice Suder at this point. I don't know if that's going to be acted on or not, and I neglected to mention that.

So I think that's -- at least as far as my client is concerned, that is the status of -- of the matter.

THE COURT: Okay. Now, tell me though, what is the basis for the recall of the mandate? I mean, has not the United States Court of Appeals for the Third Circuit taken the appeal and considered it and denied it or I should say affirmed the Court's orders? And then you -- did you -- then you went en banc –

MR. GOTTLIEB: Yes.

THE COURT: -- or you tried to go en banc.

MR. GOTTLIEB: Yes.

THE COURT: So I guess I'm trying to understand what -- I just didn't see your motion to recall the mandate. What's the basis for that?

MR. GOTTLIEB: The basis is -- is to allow us the opportunity to file a writ of certiorari with the Supreme Court.

THE COURT: Oh, okay. So it's all to give you time to go to the Supreme Court.

MR. GOTTLIEB: Yes. That's all, and have the Supreme Court make the determination, and we think it's particularly important because of the -- the Gramm-Leach-Bliley, the issues that are raised and the other issues which we -- we pursued.

So that would be the basis, just to –

THE COURT: Right.

MR. GOTTLIEB: -- give him -- us sufficient time under the rules to file a writ of certiorari and for the Supreme Court to make its determination as to whether or not it wishes to hear the matter.

THE COURT: Okay. Mr. Gottlieb, when you say the Gramm-Leach-Bliley issues –

MR. GOTTLIEB: Yes.

THE COURT: -- but you didn't present them to -- I mean, CTC certainly has presented them and presented the Financial Privacy Act issues obviously, but did -- did you present them? Not you personally, but --

MR. GOTTLIEB: Right.

THE COURT: -- did –

MR. GOTTLIEB: I think that the issue of whether or not the Gramm-Leach-Bliley Act requires additional -- an additional burden on the DOL in terms of showing jurisdiction because of the information that -- that is being sought was -- was certainly raised. It was not addressed by the Third Circuit. I grant you that, but I think it was sufficiently preserved in order to pursue the issue –

THE COURT: To the -- to the Third Circuit you mean.

MR. GOTTLIEB: -- with the Supreme Court.

THE COURT: It wasn't presented to this Court, was it?

MR. GOTTLIEB: It was presented –

THE COURT: I mean, certainly, I explored it with Mr. Gates and his client.

MR. GOTTLIEB: Your Honor, I think it was -- it was presented, but perhaps not as in as focused a fashion as it could have been, quite frankly, but it's certainly -- the issue of Gramm-Leach-Bliley and whether or not the Depart-

ment of Labor is required to make a stronger showing under -- because of the -- the -- sort of the overlay of Gramm-Leach-Bliley it's my understanding was presented to the Court.

THE COURT: When? I mean, I don't mean an exact date.

MR. GOTTLIEB: Right.

THE COURT: But in what context?

MR. GOTTLIEB: I think at the hearing, if I'm not mistaken, by Ms. –

THE COURT: Hearing.

MR. GOTTLIEB: -- by Ms. Miller when she –

THE COURT: Which hearing?

MR. GOTTLIEB: -- argued before the Court, and that would have been –

THE COURT: The hearing on the enforcement of the subpoena?

MR. GOTTLIEB: Yes. Yeah. I don't know the exact date. Now, there has been an argument that that issue has been waived, and I recognize that, but that is one of the issues that we wish -- wish to raise with the Supreme Court. There is also the issue of the -- of whether or not the Department of Labor ought to be able to -- to move forward under the circumstances where clearly, at the end of the day

they will not have jurisdiction over this matter, which I know you -- Your Honor has heard on a number of occasions, but I think it's -- it's extremely important for the -- for the Court to address whether or not just a blanket statement by the DOL that it wishes to determine whether or not it has jurisdiction is sufficient when there is a very strong indication that there is no legitimate investigative purpose for the subpoena.

We -- we also, as Your Honor probably knows, filed a motion with the Court on Friday, and I hope that Your Honor has seen it just in response to the –

THE COURT: With this Court? With this Court?

MR. GOTTLIEB: Yes, in response to the -- to the DOL's motion –

THE COURT: Oh, yes.

MR. GOTTLIEB: -- for incarceration.

THE COURT: Yes.

MR. GOTTLIEB: It's titled memorandum of law in response where we -- we lay out several scenarios, but that goes to –

THE COURT: Yes.

MR. GOTTLIEB: -- perhaps the next issue.

THE COURT: Yes. No. No. I did see that. I just wasn't sure -- I thought you were talking about –

MR. GOTTLIEB: No.

THE COURT: -- perhaps about something else. No. I did -- I do have that.

All right. Ms. Beard, did you want to respond at all?

MS. BEARD: Yes, if I may. On this -- on this question of whether the Gramm-Leach-Bliley Act and the Right to Financial Privacy Act and HIPAA and so on are -- have been preserved in Koresko, they have not, Your Honor. The -- the Third Circuit in a case called Nagle v. Alspach, A L S P A C H, 8 F.3d 141, said that to preserve an issue for appeal, it has to be set forth in the statement of issues presented and discussed in the argument section of the brief, the principal brief and not the reply brief, or it's waived, and I just reviewed both of Koresko's briefs in the Third Circuit, and the first brief in Koresko, one had ten issues and none of them had to do with any of those acts. The second one had five issues, and none of them had anything to do with any of those acts.

So I think it's been waived. They cannot present those issues to the Supreme Court –

THE COURT: I mean –

MS. BEARD: -- in the Koresko case.

THE COURT: In the Koresko -- yeah. My memory actually is -- Mr. Gottlieb, my memory is far from perfect, and every day it gets worse, but my memory is that it was presented for the first time to me when CTC raised it, and as I -- I thought it was before the Third Circuit only in the sense that there was an amicus brief by the Community Trust

Company. That's what I -- that's where -- was it not presented in an amicus brief?

MS. BEARD: They did file an amicus brief –

THE COURT: Yes.

MS. BEARD: -- in Koresko, but the Third Circuit –

THE COURT: Right.

MS. BEARD: -- did not address it –

THE COURT: Right.

MS. BEARD: -- and I don't think that was –

THE COURT: Right.

MS. BEARD: -- adequate to preserve it.

THE COURT: No. Obviously, I have no view of whether it was adequate for the Court of Appeals. They'll make that decision, but I -- I think I even in said in court that I didn't expect them to consider it, because I didn't think it had been raised before this Court, but -- but in any event, are they -- is that the argument you're raising before the Supreme Court –

MR. GOTTLIEB: Well –

THE COURT: -- asking for cert?

MR. GOTTLIEB: We're -- we intend to raise that argument as well as the argument that the Department of Labor had not met its burden in terms of showing that there was a bona fide investigative purpose for the issuance of the subpoena, which -- which this Court addressed. The Third Circuit obviously rejected that argument.

However, we believe under the facts of this case where it is virtually conceded by the Department of Labor that these plans are not subject to ERISA jurisdiction, that the Supreme Court ought to address that issue –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- and not -- and determine whether or not a bold statement by an affiant is sufficient under the circumstances.

THE COURT: And what's the timing on cert petitions these days?

MR. GOTTLIEB: Nine –

THE COURT: When are you filing your cert petition?

MR. GOTTLIEB: We have to file it within 90 days, Your Honor, of the –

THE COURT: When is that up?

MR. GOTTLIEB: The exact date –

MS. BEARD: March -- I believe it's mid-March.

MR. GOTTLIEB: That's -- it's by March 17th.

THE COURT: And what is the timing these days on decisions on cert petitions? Anybody know that? Ms. Beard?

MS. BEARD: No. I can address that.

THE COURT: Sure.

MS. BEARD: I think -- I mean, I calculated the cert petition was due March 20th, but normally, there is 30 days to -- to file an opposition to the petition for certiorari. Often, the SG's office gets a 30-day extension. Then there would be a reply brief, but I would expect cert to be denied or granted, but not -- that's not what I expect, probably on the final order list of this term, which would be June 30th or thereabouts. So it will be another six months almost, five months.

THE COURT: Okay. All right. All right. Mr. Gottlieb, I'll hear from you, sir, as to -- oh, yes. Mr. Gates. I'm sorry. Go ahead, sir.

MR. GATES: Good morning.

THE COURT: Good morning.

MR. GATES: I just wanted to respond to Attorney Beard's –

THE COURT: Sure. The gentleman who's sitting next to Mr. Koresko, I don't have your name. Oh, you're

Mr. Frankel? You want to -- the microphone, you want to just turn that around so that Mr. Gates can have it in front of him? Go ahead, sir.

MR. GATES: Is that better?

THE COURT: Yeah. No. I could hear you. I just wanted to be sure it got picked up. Go ahead.

MR. GATES: Okay. All right. Yeah. Just a comment to Attorney Beard. We did file or we did agree to the expedited appeal, and that was to I think kind of expedite the situation so that we could resolve our Third Circuit appeal.

We -- we also -- I just want to point out to the Court that depending on what the Third Circuit's response is, we may also have a Supreme Court appeal, because there is a Ninth Circuit case decided in 1983, Donovan v. National Bank of Alaska, where the court held clearly that the right to financial privacy did apply to trust departments, and the beneficiaries of all the trusts were entitled to notice. So it depends on what the Third Circuit says, but that might be an issue.

Just -- just to let the Court know, I do have two witnesses for this morning.

THE COURT: Fine. Very good.

THE COURT: Mr. Gottlieb, how would you like to proceed, sir?

MR. GOTTLIEB: I would defer, if Your Honor pleases, to counsel. Let him present evidence on behalf of

CTC first, because some of that may actually impact on my argument with permission of the Court.

THE COURT: Okay. And do you have evidence that you want to present, witnesses and the like?

MR. GOTTLIEB: Potentially, yes, depending upon who CTC calls.

THE COURT: Okay.

MR. GOTTLIEB: I may be calling Mr. Siegert.

THE COURT: Okay. Mr. Siegert about what?

MR. GOTTLIEB: It's -- it's my information, Your Honor, and I tried to confirm this through counsel, and he wouldn't answer the question, that during the pendency of the stay order in this case, that the Department of Labor did issue subpoenas on other institutions -- I don't know what institutions -- that they obtained the names of some participants, if not all the participants, in this plan, and I think that that is clearly relevant for the Court's determination of whether at this juncture Mr. Koresko ought to be sanctioned by -- with imprisonment if, in fact, the Department of Labor is, A, in possession of the information that they're seeking and B, proceeded to obtain this information while the stay was pending.

THE COURT: Okay. Well, it seems to me usually lawyers for the Department of Labor can respond to that question. I don't know that we need Mr. Siegert, but -

MR. GOTTLIEB: I don't -- the reason I mention that, Your Honor, I don't know what the facts are, because the lawyer, Mr. Neely would not respond to my –

THE COURT: Okay.

MR. GOTTLIEB: -- question before this hearing began. So I don't know what the –

THE COURT: Okay.

MR. GOTTLIEB: -- facts really are.

THE COURT: All right. Let me hear from Ms. Thomasson.

MS. THOMASSON: Your Honor, if I may, and I can –

THE COURT: Sure.

MS. THOMASSON: -- speak about this later if that's –

THE COURT: Sure.

MS. THOMASSON: -- preferable, but the Department of Labor would object to the calling of Mr. Siegert. His testimony about other investigations is –

THE COURT: No. I don't –

MS. THOMASSON: -- wholly irrelevant.

THE COURT: I don't see any need to call Mr. Siegert. If there is relevance, for example, if one of the arguments that Mr. Gottlieb is making is, as I think it is, that the Department of Labor already has the information or at least some of the information that it's looking for so let us go forward and, you know, do the cert petition before you incarcerate Mr. Koresko. it seems to me that the lawyers can tell -- can tell us that, whether -- you know, what -- whether the Department of Labor has the documents already.

MS. THOMASSON: Well, Your Honor, actually, our other position would be that what other investigation the Department of Labor may be doing is irrelevant to whether or not Mr. Koresko has complied with a valid court order that's been upheld by the Third Circuit.

Also, our other pending investigations are really -- are privileged material –

THE COURT: No. I'm not going to –

MS. THOMASSON: -- that we do not –

THE COURT: Yeah. I'm not going to ask you about any pending investigations, but let's just take that as we get to it, Ms. Thomasson, but I already did say that -- is it Thomasson? Am I saying that right?

MS. THOMASSON: Yes, Your Honor. Thank you.

THE COURT: Yeah. But I already did say that at least at the moment, I haven't heard any reason to call Mr. Siegert, but let's start with Mr. Gates. Go ahead, sir.

MR. GATES: Okay. Thank you. I call Susan Russell to the stand.

THE COURT: Come on up, Ms. Russell. Come on up here, ma'am, to my right to the witness stand, and you'll be sworn in.

Yes. Good morning. Just walk around, stand in front of the chair, raise your right hand, and you'll be sworn in.

SUSAN RUSSELL, DEFENDANT'S WITNESS, SWORN

THE CLERK: Please be seated. Will you please state your name and spell your last name for the record.

MS. RUSSELL: Susan A. Russell, R-U-S-S-E-L-L.

THE COURT: And you may proceed, Mr. Gates, from there or the podium, wherever you want to be, sir.

MR. GATES: Okay. I have some exhibits I want to bring up later.

DIRECT EXAMINATION

BY MR. GATES:

Q Ms. Russell, could you please give us your job title?

A I'm the President and CEO of Community Trust Company and President and CEO of Community Financial, the holding company of Community Trust Company.

Q How long have you been in that position?

A Three years.

Q Could you describe the regulatory status of Community Trust Company?

A We are a nondepository trust company regulated by the Pennsylvania Department of Banking.

Q And where are your offices?

A In Camp Hill, Pennsylvania.

Q What types of services do you provide?
A We provide trust services and investment management services to individuals and entities.

Q Okay. Could you maybe describe in a little more detail types of clients, types of individuals?

A Well, we serve in the capacity as trustee, custodian, investment advisor, investment manager. We have irrevocable trust. Most of our trusts are irrevocable, charitable trusts, special needs trusts, and we have -- we do investment management for individual and businesses. We services IRA clients and VEBA's.

Our clients can be -- we have a lot of elderly clients that we service. We have disabled people, and we have business people.

Q What does it mean to be a trust company?

A In -- as a regulated entity being a independent trust company, we -- we do not take deposits from customers for

checking or savings. All we perform are fiduciary services. We take deposits on behalf of our trust clients, but we do not serve the general public. We do not do check -- we do not service checking accounts, savings accounts, those sort of things. We just service fiduciary type accounts.

Q So then it would be safe to say that you don't have any involvement of the FDIC.

A No. We are not regulated by the FDIC at all.

Q Okay. And you don't accept any deposits?

A No.
Q Okay. I should have asked this earlier, but could you describe a little bit about your background, your experience?

A I've worked at various other institutions in the Central Pennsylvania area, specifically in the trust areas, both in management, administration, and tax for almost 25 years.

Q Describe a little bit about the employees of the trust company.

A We have eight employees, all of which serve in different areas of the trust department. Basically, I would divide up the functionality into administration, investments, tax, and management type function and sales, and we have individuals that work in each of those categories, and most of -- because the nature of our business is very complex, most of the staff that I have also have many years of experience doing the jobs that they do in the trust industry.

Q Okay. One of the -- one of the jobs you mentioned was a trust officer. What -- what do they do?

A The trust officer is responsible for the day-to-day administration of an account, meeting with clients, doing account reviews, making certain distributions, if required, just overall general review of the account and -- and the contact with the client.

THE COURT: Are you seeking permission to approach the witness, sir?

MR. GATES: Yes.

THE COURT: You may do so, but just ask –

MR. GATES: Okay.

THE COURT: -- before you do.

MR. GATES: Thank you.

THE COURT: You may approach the witness.

MR. GATES: Could we move these into admissior singly or –

THE COURT: However you would like to do it Did you have an exhibit number for this?

MR. GATES: Yes. I guess it would be responden number 1.

THE COURT: Okay. We don't mark exhibits. So you need to just mark it yourself, but I'll mark it respondent 1, the copy I have, but people mark their own exhibits in District Court.

MR. GATES: Okay.

THE COURT: Okay?

BY MR. GATES:

Q Ms. Russell, could you tell us what this document is?

THE COURT: This is Respondent 1, right?

MR. GATES: Respondent number 1.
THE COURT: Okay.

A This is the overall plan document for the REAL VEBA account for which we serve as trustee.

BY MR. GATES:

Q Okay. And as such, what does this plan do?

A It provides certain benefits to employers and their employees.

Q Okay. I guess maybe let me rephrase it. Would this document then control how the VEBA operates?

A Yes.

MR. NEELY: Objection, Your Honor. He's leading the witness.

THE COURT: Well, you did, but it's already been answered. So that's fine, but don't lead the witness, sir. Just –

MR. GATES: Okay.

THE COURT: -- ask open-ended questions.

MR. GATES: If I may approach?

THE COURT: Yes.

MR. GATES: And if we could mark this as Respondent number 2.

BY MR. GATES:

Q And again, Ms. Russell, could you tell us what this document is?

A This is the master trust agreement. It overlays the underling plan document which has the specifics of the plan. Thi defines our relationship as trustee to the plan and also ou relationship with PennMont serving as the administrator o the plan.

Q Okay. So this trust agreement controls the trust company's functionality.

A Right, with PennMont and -- and the plan itself.

Q Ms. Russell, if you -- if you could, could you tell us what -- what law governs this VEBA account?

MR. NEELY: Objection, Your Honor.

THE COURT: Sustained.

BY MR. GATES:

Q Do you know who the plan administrator is for VEBA?

A The plan administration is PennMont.

Q And what is your understanding of the purpose of the REAL VEBA?

A It is to provide certain employee benefits to companies that participate in the plan either through insurance type products or other -- other benefits.

Q Okay. And in your opinion, do you believe that a REAL VEBA to be covered by ERISA?

A I do not.

MR. NEELY: Objection, Your Honor.

THE COURT: Sustained. Sir, this witness is here as a fact witness. Her legal view of things is just not relevant to this Court.

MR. GATES: I think her impressions of what the plan is –

THE COURT: Sir, I've ruled. You can move on to your next question.

BY MR. GATES:

Q Describe what services the trust company provides for REAL VEBA.

A We -- we receive deposits in from employers and employees, and we pay -- pay out those deposits based on direction from the administrator to various insurance companies tc purchase benefits for the underlying employees.

THE COURT: Could you just say that again ma'am? And repeat your question. What was your question Mr. Gates, again? The services that the company provides for the REAL VEBA?

MR. GATES: Correct. As trustee, what services dc they provide –

THE COURT: Okay.

MR. GATES: -- for REAL VEBA.

THE COURT: As trustee, what services. Go ahead ma'am. If you could say that again. I just want to make sur I understand what you're saying.

A Okay. We receive in deposits from the plan administrate on –

THE COURT: PennMont sends you –

A Yes.

THE COURT: -- money or checks or something.

A Right.

THE COURT: Deposits. Okay.

A From the employers representing their employees. We invest those dollars in a money market account, and then we disburse them according to the direction from the plan administrator, PennMont, to pay certain premiums for insurance products.

THE COURT: Okay. Is that what I -- haven't we been through this before? I thought there wasn't -- I'm a little confused. I thought, Ms. Russell, when we were all here last time, either when you were here or when I was on the telephone, that you all said you don't sort of touch money or deposits or checks. Ms. Roller is shaking her head yes.

MS. ROLLER: Yes. I -- I agree, Your Honor. My recollection is the last time we were here, Mr. Peterlin was representing CTC and Ms. Russell was here as the client representative, that an affirmative statement was made to the Court that no money was received by CONTRACT. So I am also quite amazed by Ms. Russell's testimony today.

MS. RUSSELL: If I –

THE COURT: Sure.

MS. RUSSELL: If I could clarify.

THE COURT: Go ahead. Well, of course.

MS. RUSSELL: We don't actually receive the physical checks. Much of what we do in the trust department, we never see cash. We hold accounts at various places where deposits are made, and -- and we pull money out. We very rarely see cash.

But, no. Those -- we receive payments, but it's not a physical check. Those dollars are deposited into an account from which we take those monies and invest them in a money market, and then at a later time at the direction of the administrator, we bring those dollars in to wire back out for –

THE COURT: You bring them –

MS. RUSSELL: -- payment.

THE COURT: -- in to CTC to –

MS. RUSSELL: Uh-huh.

THE COURT: -- wire back out to whom?

MS. RUSSELL: To the various entities that we're paying, insurance companies.

THE COURT: The employers or –

MS. RUSSELL: No.

THE COURT: -- the employees?

MS. RUSSELL: Well, both.

THE COURT: Okay.

MS. RUSSELL: We pay premiums or there could be disbursements out to –

THE COURT: Okay.

MS. RUSSELL: -- participants.

THE COURT: So when you say you invest money, is money wire transferred into you at all or you just -- there is another entity –

MS. RUSSELL: We –

THE COURT: -- that has the -- the deposits?

MS. RUSSELL: Right. Right.

THE COURT: And then you tell the other entity where to send them for investment?

MS. RUSSELL: We take that money and -- and invest it in our account for further disposition.

THE COURT: I don't know what you mean by take. I just don't –

MS. RUSSELL: We wire it. We wire it from one account to our account where we have a money market.

THE COURT: You wire it.

MS. RUSSELL: Yes.

THE COURT: So you're in charge of the account that it comes to so that you can wire it?

MS. RUSSELL: We have instructions with an institution that we have the authority to take these funds and wire it to our account for investment in a money market, and then at some later point whenever -- by the direction of the third-party administrator, we pull in those funds, wire them in, and disburse them out according to the instructions of the administrator.

THE COURT: Okay. Go ahead, Mr. Gates.

MR. GATES: Good. And if I could interject, I think the -- the reference earlier to testimony is inaccurate. Sue Russell has never testified yet.

THE COURT: It wasn't testimony, sir.

MR. GATES: It was just –

THE COURT: We weren't talking about testimony, Mr. Gates. No. Ms. Russell has never testified. We were talking about representations made to the Court with Ms. Russell present, or it may have been on the telephone, Ms. Roller, to tell you the truth. I'm not sure whether it was in court or on the telephone.

MR. GATES: Right.

THE COURT: But both of them are on the record, and the record will speak for itself.

MR. GATES: Right.

THE COURT: I'll just have to go back and look at it, but we all know –

MR. GATES: And I'm simply saying Mr. Peterlin didn't know the actual mechanics.

THE COURT: I don't know what anybody knew. All I know is that I've been getting confusing and at least to me it seems inconsistent representations.

MR. GATES: Right. That's why I thought I would bring the person who would know.

THE COURT: All right, sir. Go ahead.

MR. GATES: Okay.

THE COURT: But don't -- Mr. Gates, you have a tendency to sort of reply to the Court and make comments. Just answer the questions, sir, or ask the questions of your witness, sir.

MR. GATES: Okay. Thank you. If I could approach?

THE COURT: Yes. Thank you.

BY MR. GATES:

Q And Ms. Russell, could you identify this document, please?

A This is a –

THE COURT: Is this -- I'm sorry, ma'am. Is this Respondent 3?

MR. GATES: Number 3. Yes, please.

THE COURT: All right. Go ahead, ma'am.

A This is a limited power of attorney document that is -- I believe was drafted by Mr. Koresko, and every employee and employer executes one of these on behalf of their participation in the plan.

Q And what is the purpose of this document?

A It's to –

MR. NEELY: Objection. There is no basis for her knowing what the purpose is if she didn't draft it.

THE COURT: Well, why don't you -- all right. Why don't you try to lay a foundation, sir? I'll sustain the objection, but why don't you lay a foundation, if you can.

MR. GATES: Okay.

BY MR. GATES:

Q You are the trustee of REAL VEBA?

A Correct.

Q Okay. And this is one of the documents used in the REAL VEBA plan?

A Correct.

Q Okay. And what is the purpose of this document in that plan?

A It gives the -- it shows us who has authority to act on behalf of the employees and the employers that are participants in the plan.

Q Okay. And this would typically then grant PennMont the authority to act for the employees?

MR. NEELY: Objection, Your Honor.

THE COURT: Sustain the objection. Sir, don't -- you're leading the witness. Please don't lead. Just ask –

MR. GATES: Okay.

THE COURT: -- witness what things do –

MR. GATES: Who –

THE COURT: -- instead of telling her what they do.

BY MR. GATES:

Q Who would typically sign this document?

A I believe Mr. Koresko signs it with the employee or the employer.

Q Okay. And is the power of attorney irrevocable?

MR. NEELY: Objection.

THE COURT: Sustained.

BY MR. GATES:

Q Do you -- does Community Trust Company as trustee maintain information for each of the individual employees?

A We do.

Q Okay. And do you know if PennMont as the plan administrator also maintains separate accounts?

A They do.

MR. GATES: Marked as Respondent number 4, and if I could approach.

THE COURT: Sure.

BY MR. GATES:

Q Ms. Russell, could you please tell the Court what Respondent number 4 is?

A This is our privacy statement that we created as an outcropping of Gramm-Leach-Bliley that we provide to our clients both as a new client and annually on an ongoing basis.
Q Okay. And is this part of your regulatory compliance?

MR. NEELY: Objection, Your Honor. The relevance of this is -- is marginal, at best. We're here to decide, and see the reasons why she hasn't produced the documents that –

THE COURT: Uh-huh.

MR. NEELY: -- she agreed to produce back in August and which you ordered CTC to produce.

THE COURT: I understand, and it is marginal, but I'll allow it. Overruled. You may answer.

BY MR. GATES:

Q Is this part of your regulatory compliance?

A It is.

Q And that would be part of what regulatory scheme?

A Our regulator of the Department of Banking would verify that we have -- that we would be complying with Gramm-Leach-Bliley by notifying our clients of our position on privacy matters. Our internal regulators also look at that when they audit us.

Q To the best of your knowledge, have any of the employees of REAL VEBA consented to the release of their personal financial information?

A To the best of my knowledge, no.

Q Has the Department of Banking -- I'm sorry. Has the Department of Labor certified to CTC whether they've complied with the right to financial privacy?

MR. NEELY: Objection; relevance.

THE COURT: I'll allow it.

A Not to my -- not to my knowledge.

MR. GATES: I have nothing further.

THE COURT: Really? Sir, Mr. Gates -- Mr. Gates, aren't you going to ask Ms. Russell about what we're here for? In other words, the issue now are the documents that Ms. Russell, as Mr. Neely just said -- I mean, obviously, the Department of Labor would like me to have a broader view of things, but at a minimum, I held CTC in contempt for not producing the documents that when Ms. Russell was here they agreed to produce, documents that don't contain any employee names. So I don't -- I haven't heard anything about that. Did you want to ask Ms. Russell any more questions?

BY MR. GATES:

Q The information that Attorney Peterlin agreed to provide at the August 17th hearing, I believe you were there at that -- at that hearing. Does that -- the information that you agreed to provide, were you -- were you aware of the contents of the documents at the -- at the August 17th hearing?

MR. NEELY: Objection.

THE COURT: Sustain –

MR. NEELY: Can he rephrase that?

THE COURT: -- the objection. Sustain the objection.

BY MR. GATES:

Q At the hearing, did you have -- based on your -- based on your knowledge, did you know what was in -- in the documents?
A I know what documents we have at the trust company on behalf of REAL VEBA and -- on behalf of REAL VEBA. It was not clear to me when we hurriedly went through what Mr. Peterlin agreed to give over that there -- there were going to be discrepancies, there were going to be divulging of personal information on clients on what -- what he had agreed to.

We -- I don't feel we had sufficient time to address that in the courtroom, and I think that -- I think we were both -- I was caught off -- caught off guard in terms of -- of being able to ascertain whether or not we'd be revealing any personal or confidential information.

Q Did you have the documents with you –

A No.

Q -- at that -- at that hearing?

A I did not.

Q How many documents would you say there -- there are in order to comply with the subpoena? How many documents would you have to produce?

A Oh, there would be thousands of pages, maybe six or eight boxes or more of documents.

Q Do you work –

A Bankers boxes.

Q -- personally on that account?

A On a day-to-day basis, no. Not anymore.

Q So you would have no reason to know what was on any particular document.

THE COURT: Sustained. Sir, don't lead the witness. You're leading the witness.

BY MR. GATES:

Q Would you have personal knowledge of what is on any particular document?

A Yes.

Q Would you know whether the documents had personal information for the employees?

A Yes, I would know. Again, I think when -- when we were discussing what documents could be turned over, we were talking more of organizational documents and certain -- as I mentioned earlier about the movement of money back and forth, and because I don't work with those documents on a day-to-day basis, that I don't see them, I think once we discussed what we had discussed in the courtroom on August 17th, I realized that there was confidential information or there was customer information on virtually everything that we had discussed.

Q Okay. Which would have made it -- or would that have made it difficult to comply –

A Right.

Q -- with -- with the order?

A It would have.

THE COURT: What's the difficulty, sir? You're not terribly helpful to me. Why don't you ask your witness –

BY MR. GATES:

Q Would -- would that have –

THE COURT: -- why the witness changed her mind, if she was the one who changed her mind, why she changed her mind, what the difficulty would be.

BY MR. GATES:

Q Would that have made it impossible to comply with the order and not violate the Right to Financial Privacy Act?

THE COURT: I'll sustain –

MR. NEELY: Objection.

THE COURT: -- the objection. You can ask the questions I suggest. If you don't want to ask them, that's fine, sir. You don't have to continue asking the witness any questions. It's your witness. If you're finished, that's fine. I think you finished a while back, and I had suggested you ask some more questions, but if you don't choose to, that's absolutely fine. Go right ahead.

MR. GATES: I think I'm done.

THE COURT: All right.

MR. GATES: Thank you.

THE COURT: Mr. Neely or whoever is going to question.

MR. NEELY: Your Honor, can I take a moment to confer?

THE COURT: Absolutely.

MR. NEELY: Thank you.

THE COURT: Go right ahead. Sure.

MR. GOTTLIEB: May I ask one question, couple questions why he's conferring?

THE COURT: Sure, Mr. Gottlieb.

MR. NEELY: Your Honor, I'd like an opportunity to confer –

MR. GOTTLIEB: Before I ask any questions? Sure.

MR. NEELY: Is that okay?

THE COURT: Sure.

MR. NEELY: Thank you.

(Pause)

MR. NEELY: Your Honor, the Department has no questions of this witness.

THE COURT: All right. Mr. Gottlieb, did you want to ask a couple questions?

MR. GOTTLIEB: Yes.

CROSS-EXAMINATION

BY MR. GOTTLIEB:

Q You testified earlier that vou received direction –

THE COURT: Please rise when you're talking, sir.

MR. GOTTLIEB: You -- sorry, Your Honor.

BY MR. GOTTLIEB:

Q You testified earlier that you received directions from the plan administrator on the administration of the trust.

A Correct.

Q What is the name of the plan administrator that you received instructions from?

A PennMont.

MR. GATES: Your Honor, I have to just raise an objection. I'm not sure if it's appropriate for Mr. Gottlieb to be asking questions in a CTC matter. He's not involved in that case. He hasn't entered –

THE COURT: Well, I guess he –

MR. GATES: -- an appearance in that case.

THE COURT: He could -- however, he probably could call Ms. Russell on his own if he wanted to, couldn't he, as a witness?

MR. GATES: In the Koresko matter.

THE COURT: Yeah. Yeah. Let's just see -- yeah. I assume you're asking questions on behalf of your own client.

MR. GOTTLIEB: Yes. That's correct.

THE COURT: Yeah. Sure. No. That's all right.

MR. GATES: Okay.

THE COURT: Go ahead, and you can -- you know, you can object if you think something is inappropriate that's being asked, but I'll allow some questions. Go ahead, Mr. Gottlieb.

BY MR. GOTTLIEB:

Q And in your administration of the trust, were there any considerations given to the Gramm-Leach-Bliley Act and whatever requirements you have -- you understand there to be?

MR. NEELY: Objection.

THE COURT: In what, sir? In your administration?

MR. GOTTLIEB: Yes.

THE COURT: What's your objection, sir?

MR. NEELY: That there -- that there is no basis for her knowing that she knows anything about the Gramm-Leach-Bliley Act.

MR. GOTTLIEB: I'm not asking –

THE COURT: All right.

MR. GOTTLIEB: -- for the specific -- for her specific knowledge but whether or not there were considerations given.

THE COURT: When she personally gave consideration to the Gramm-Leach-Bliley Act in doing what?

MR. GOTTLIEB: In the administration of the trus pursuant to her responsibility.

THE COURT: In her personal administration.

MR. GOTTLIEB: Yes.

THE COURT: Can you answer that, ma'am?

MS. RUSSELL: I can.

THE COURT: We're all talking now about you own head, what's in your head.

MS. RUSSELL: Yes.

A In my head and that of my staff, yes. We give consideration to Gramm-Leach-Bliley for this account and every account we administer to privacy.

BY MR. GOTTLIEB:

Q And why is that?

A Because we're -- we're required to under the Gramm-Leach-Bliley Act.

MR. GOTTLIEB: I have no other questions.

THE COURT: All right. Mr. Neely, did you want to ask any questions at this point?

MR. NEELY: No. Thank you, Your Honor.

THE COURT: All right. Thank you very much, Ms. Russell. You may step down, ma'am.

(Witness excused)

THE COURT: And Mr. Gates, I think you said you had another witness, and you may have more than that, but I thought you said at least another one.

MR. GATES: Yes, one more. I'd like to Nicholas Dunphy.

THE COURT: Sure. Come on up, sir. Thank you. Come on up and stand in front of the chair, and you'll be sworn in.

THE CLERK: Please raise your right hand.

NICHOLAS DUNPHY, J R.,
RESPONDENT'S WITNESS, SWORN

THE CLERK: Please be seated. Will you please state your name and spell your last name for the record?

MR. DUNPHY: Yeah. It's Nicholas E. Dunphy, D-U-N-P-H-Y, Jr.

THE COURT: Why don't you move your chair up sir, and then you don't have to sort of bend forward like that There you are. Go ahead, Mr. Gates.

DIRECT EXAMINATION

BY MR. GATES:

Q Good morning, Mr. Dunphy.

A Good morning.

Q Could you please state your position with Community Trust Company?

A I'm on the Board of Directors.

Q Okay. And how long have you been on the Board of Di rectors?

A Approximately three years.

Q Are you aware of the present case today, Chao v. Community Trust Company?

A Yeah. The board has been made aware of the progress of the suit.

Q Okay. And are you aware of the REAL VEBA trust account?

A Yes, we are.

Q And could you describe your knowledge of the account?
A We -- the board has been informed that -- that we've been served to provide papers and names of clients to the Department of Labor.

Q What is -- what is your understanding of the -- the trust company's ability to provide the information to the Department of Labor?

A We're very concerned that if we -- as a small trust company, that if we provide the names of all the participants in the plan, that we're going to be subjected to multiple lawsuits.

Q Lawsuits by whom?

A By the plan participants.

Q How do you know that?
A The Graham-Leach is discussed many times in the boardroom, and we're very concerned that -- that the violation of

privacy, that's why we send out those privacy forms with all their statements -- will be violated.

THE COURT: I think the question was why do you think there will be lawsuits.

A We think there will be lawsuits because the -- the invasion of privacy, not having the approval of the -- the participants.

THE COURT: Has somebody told you that they're going to sue you if you give over documents pursuant to the subpoena?

MR. DUNPHY: No, but I think we've often talked about the fact that if we don't alert the participants of -- of the need to provide their name, that we would be open to a lawsuit.

THE COURT: You're talking generally now or on this particular matter?

MR. DUNPHY: Generally.

THE COURT: Have you ever -- are you the decision maker on this particular matter to -- to refuse to comply with the Court's order?

MR. DUNPHY: No.

THE COURT: Who is the decision maker?

MR. DUNPHY: I believe the decision maker would bring -- would probably be Sue Russell who would bring it to the board, and then she would ask for a board resolution.

THE COURT: When you say would be, who made the decision in this matter specifically not to comply with the Court's order?

MR. DUNPHY: I think it would be the board.

THE COURT: When you say would be, who was it? In other words –

MR. DUNPHY: I'm not –

THE COURT: -- who was it?

MR. DUNPHY: I'm not -- I'm not sure if it was voted on the board through legal advice not to -- not to turn over the documents or if it was -- I don't know. I don't know exactly who made the decision.

THE COURT: All right. Sir, do you have any specific knowledge about this particular matter, I mean specific discussions or decisions made on this matter as opposed to generally how the CTC operates?

MR. DUNPHY: We have -- we as a board have been abreast -- kept abreast on the progress of this case.

THE COURT: Okay. Go ahead, Mr. Gates.

MR. GATES: That's -- that's all I have.
THE COURT: All right. Mr. Neely.

MR. NEELY: Thank you, Your Honor. Can I take a moment to confer –

THE COURT: Sure.

MR. NEELY: -- before I begin? Thank you.

THE COURT: Surely.

(Pause)

MR. NEELY: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. NEELY:

Q Mr. Dunphy, can you tell me who the other members o the CTC board are?

A Sure. Do you want all their names?

Q Yes, please.

A Dr. Stoner –

Q Can you give me a first name as well?

A I don't -- you know, to get them all, if I had -- I'm tryin to think of it. It's Bill Havisivitch (phonetic). I can't thin of Dr. Stoner's first name, because I always call him Docto Myself, Nick Dunphy, Chuck Henry, Sue Russell, Lowe Gates, and I think I'm missing one. Maybe I'm not. I'm not

sure -- I'm not sure if I'm missing one. I'll think about it, but –

Q Is there an Andrew Core?

A And Andrew Core. There you go.

Q And those individuals comprise the entire board?

A Yes, they do.

MR. NEELY: That's all I have, Your Honor.

THE COURT: All right. Thank you very much.

Mr. Gottlieb, did you have anything for Mr. Dunphy?

MR. GOTTLIEB: No, Your Honor. Thank you.

THE COURT: You may step down, sir. Thanks very much.

(Witness excused)

THE COURT: Mr. Gates, any other evidence, sir?

MR. GATES: That should be it.

THE COURT: Okay. Mr. Gottlieb, did you want to decide -- I think you said you were going to wait to see what whether you -- what you wanted to do --

MR. GOTTLIEB: Yes.

THE COURT: -- in terms of evidence.

MR. GOTTLIEB: Your Honor, the only witness that I would seek permission to call is the investigator from the DOL, Mr. Siegert, that counsel responded to earlier. I agree completely with the Court that -- that counsel can answer the question. I'm asking that the Court direct counsel to answer the question.

I'm not interested to know about all of their other investigations. That's not relevant here. What I am -- what I do believe is clearly relevant is whether or not the Department of Labor, A, issued subpoenas to other institutions, and B, obtained the names of the participants in this plan which is the subject of this -- this hearing today, and I'm asking the Court to direct counsel to answer those two questions that they indicated earlier that they were not inclined to answer.

THE COURT: I'm not sure, when you said the names. I mean, what -- this is a subpoena for documents.

MR. GOTTLIEB: Yes.

THE COURT: I mean, the documents may or may not have names on them, but I'm not sure what you're talking about.

MR. GOTTLIEB: Okay. What –

THE COURT: What is -- what is the evidence that you have that there is -- that the Department of Labor has certain information, and then what's the legal relevance of it?

MR. GOTTLIEB: Okay. First of all, just talking about the documents –

THE COURT: Sure.

MR. GOTTLIEB: -- there is approximately -- the responsive documents to the subpoena that was issued to PennMont numbers approximately 350,000 documents. Of those 350,000 documents, there are certain documents that contain information that would reveal the identity of the participants in the plan. It's the identity -- it's that information –

THE COURT: Not the -- are you talking about the employers now or the employees?

MR. GOTTLIEB: The employers.

THE COURT: The employers.

MR. GOTTLIEB: Yes.

THE COURT: Okay.

MR. GOTTLIEB: And employees. Excuse me. Really, both. I -- and I apologize for that, Your Honor.

THE COURT: All right. No. That's all right, Mr. Gottlieb, but it's just that I -- throughout this whole proceeding, I do get all kinds of information, and it's really hard to understand at any given time what facts I'm being told are.

MR. GOTTLIEB: And I sincerely apologize for that misstatement.

THE COURT: But you have not been before me before, so it –

MR. GOTTLIEB: Right.

THE COURT: -- completely not apply to you. Bu just -- so tell me again. Go ahead. Go ahead, sir. Continue on.

MR. GOTTLIEB: Okay. And I apologize for tha misstatement.

THE COURT: But you have to be -- when you'r saying clients, people have been throwing names around clients –

MR. GOTTLIEB: I'm not –

THE COURT: -- participants. I don't sometime know whether you're talking about employers or employee or who you're talking about.

MR. GOTTLIEB: What I'm speaking about, You Honor –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- are the identity of the employ ers and the employees who are participants –

THE COURT: In the REAL VEBA.

MR. GOTTLIEB: -- in the plan which is administered by the Community Trust directed by -- by PennMont as the -- as the third-party administrator. That's –

THE COURT: I thought the administrator was PennMont.

MR. GOTTLIEB: Yeah.

THE COURT: Okay.

MR. GOTTLIEB: The administrator who directs CTC –

THE COURT: Okay.

MR. GOTTLIEB: -- and it is that identification shall we say, material, which is really the heart of the -- of the issue here.

It's my understanding that -- and I might add, Your Honor, that we're certainly prepared to provide all of the documents that are responsive to the -- to the subpoena except those documents that would reveal the identity of the participants, both employer and employee participants. It's my understanding, and I got this secondhand –

THE COURT: From –

MR. GOTTLIEB: Actually, from my -- from my client on Thursday of last week that at least two participants

and I believe employer participants in the plan were contacted by Mr. Siegert of the Department of Labor, and it's for that reason that I wanted to explore whether or not subpoenas were -- were served on other institutions which arguably may or may not be relevant whether the subpoenas were served, although I would suggest that it is, and more importantly, whether or not the Government, whether or no the Department of Labor is in possession of the identification information which we have been -- which really is the subject of this litigation which we have been refusing to -- to produce to them because of Gramm-Leach-Bliley considerations and other considerations.

So that's the purpose of asking that question.

THE COURT: Okay. Let me just be -- and we will get to that. Let me just be sure I understand something. Today, the only -- the only statute I've heard about is Gramm Leach-Bliley. Neither party has brought up the Financial Privacy Act. Is nobody relying on that anymore? Mr. Gates?

MR. GATES: We're relying on both.

THE COURT: All right. But you didn't ask any questions about that, but you're relying on both. All right. And also, you mentioned a moment ago, Mr. Gottlieb, that you'd be willing to give certain documents. Why don't -- why don't you all give whatever it is you're willing to give? Why don't you just give them?

MR. GATES: Because the Department of Labor basically has refused -- and I'll give you my understanding.

THE COURT: Uh-huh.

MR. GATES: And I offered this as late as Friday. They are not willing to receive the documents unless they receive all the documents including participant information. We are –

THE COURT: Right.

MR. GATES: -- absolutely prepared to produce the documents that do not include participant information, and if I could sort of cut to the chase with the Court's permission, I will in terms of what our position is today, and that is that I believe based upon the requirements of Gramm-Leach-Bliley that all the documents can be produced, including participant information, so long as there is a confidentiality order issued that would prohibit the Department of Labor from distributing that information, that is, the participant information to anyone or any entity.

That will satisfy all of the concerns here, and I cannot for the life of me understand why the Department of Labor -- and I raised this with them on Friday -- is unwilling to agree to a confidentiality order, and it's therefore I think abundantly clear that there very well may be no legitimate investigative purpose in these subpoenas. There would be no reason in my view for them not to agree to this -- to this suggestion, and I -- and I provided to the Court, as Your Honor knows, case law, three cases, one being the District Court in West Virginia, which -- the Marks case, where the court entered that very same confidentiality order, and all three

courts, all three courts have very strong language in them where they -- where it is recognized that the protections which the -- which Congress sought to afford, the participants or individuals regarding financial information is important enough to make sure that that information is protected.

So we are prepared to produce all of the documents including participant information, so long as there is a confidentiality order that is -- that is entered in this case

.

THE COURT: Okay. So your view of Gramm Leach-Bliley is that it would be complied with if -- you could give it to the Secretary of Labor under Gramm-Leach Bliley if the Secretary of Labor was just going to use it fo themselves and not give it to someone else. And who do you -- and you're saying that they don't really -- this is all -- as understand your thinking –

MR. GOTTLIEB: Yes.

THE COURT: -- this is all a ruse by the Departmen of Labor to get it for some other agency? I can't –

MR. GOTTLIEB: Well –

THE COURT: -- quite figure out what your –

MR. GOTTLIEB: You know –

THE COURT: -- thoughts are.

MR. GOTTLIEB: -- I'm not -- excuse me, You Honor. I'm not a mind reader. Okay? But I know that the

Department of Labor, A, has refused the suggestion, and B, has conceded that ultimately, there is no -- that these plans do not enjoy ERISA jurisdiction.

Now, there have been allegations made throughout this case that the IRS may be interested or there have been other motives. I, frankly, and I know the Court probably is not interested in that.

What I am interested in, Your Honor, is that the -- the privacy of these individuals -- this does not involve Mr. Koresko or PennMont. It involves third parties, individuals whose privacy rights ought to be maintained.

And may I also add, Your Honor, that under the ERISA act itself that the Court ruled when you –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- when you initially ruled, that clearly, that they -- that the Department of Labor had the authority to -- to issue this subpoena, that the very language of the -- of the authority under 504 of the Department of Labor to issue this subpoena states in order to determine whether any person has violated ERISA. The language of the -- of the statute itself limits and provides the parameters of the use.

THE COURT: But didn't you already argue this to the –

MR. GOTTLIEB: No.

THE COURT: -- Court of Appeals?

MR. GOTTLIEB: This -- this issue of a protective order has not been.

THE COURT: Uh-huh.

MR. GOTTLIEB: I'm not speaking about the authority now. I am completely respectful of the Court's order in this case and of the Third Circuit's determination that jurisdiction -- and I'm assuming for these purposes that we're bound by that. We clearly are -- that jurisdiction on the plan itself –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- is not a prerequisite for the authority of the Department of Labor to issue the subpoena I'm accepting that.

What I'm -- what I'm saying, Your Honor, is that under Gramm-Leach-Bliley where there -- where there are clearly carve out positions, where there are exceptions, one of the exceptions is if it's responding to -- to judicial proces --

THE COURT: Right.

MR. GOTTLIEB: -- or it's responding to subpoena it should be turned over. I'm accepting that as well.

THE COURT: Well, then why isn't Gramm-Leach-Bliley –

MR. GOTTLIEB: What I'm –

THE COURT: -- a moot point then?

MR. GOTTLIEB: Because they're unwilling to enter into a confidentiality order to maintain the privacy. I'm saying yes, they're entitled to it because they've subpoenaed it under Gramm-Leach-Bliley. What they're not entitled under Gramm-Leach-Bliley is to -- is to disseminate that material to any other entity.

THE COURT: All right. Well, even assuming for the moment, and it's a big assumption, that Gramm-Leach-Bliley would apply to your client's production of these documents, they're -- and I haven't looked at it for today, because really, and the Department of Labor will say it and it is true. This really isn't for today, but let's just talk about it for a moment. I'm just trying to understand everybody's position, because it seems to shift all the time.

But one of the exemptions or exceptions was for a lawfully issued subpoena.

MR. GOTTLIEB: Yes.

THE COURT: Does that section say anything about a confidentiality order being a part of that?

MR. GOTTLIEB: The section itself –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- does not speak to a confidentiality order. The section speaks to the exception in terms of providing that information to the third party that is seeking that information.

THE COURT: Right.

MR. GOTTLIEB: But the cases which I submitted tc the Court, the Marks case, for example, which is the District Court, stated that the Court recognizes however that Congress has expressed a strong interest in protecting the privacy of consumers' financial information. For that reason, it is appropriate for a court to exercise its broad discretion tc fashion protective orders.

And the Supreme Court of Alabama, to the exten that it's persuasive to this Court, stated -- and I also cited tha case -- that a court when exercising the broad discovery discretion by ordering the discovery of customer's nonpublic personal information should also issue a comprehensive protective order. They put it in terms of obligatory on the court's part.

But -- and all of it is simply designed to balance the clear interest in protecting customer information against the providing of that material in response to, in this case, a subpoena.

THE COURT: You know, but if the -- if the Gramm Leach-Bliley Act applies to your client and it's the reason why you're not producing documents, you didn't -- nobod told me about this when we were all here together at the beginning of the Koresko matter. So I'm just a little confuse as to why suddenly this is the be all and end all for your client.

MR. GOTTLIEB: Well –

THE COURT: CTC brought it up at the beginning.

MR. GOTTLIEB: Yes, Judge.

THE COURT: But I don't really understand this –

MR. GOTTLIEB: Well –

THE COURT: -- Mr. Gottlieb.

MR. GOTTLIEB: -- in the first instance when the -- when the Court first heard this matter, there were various objections raised to the authority of the Department of Labor to issue the subpoena to begin with. That is my reading of the record, and part of it involved the argument that since the Department of Labor did not ultimately have jurisdiction over the plan, that they should not be able to subpoena documents, knowing full well that that's the case.

That was an issue that was brought before the Court, and Your Honor ruled otherwise. On appeal, that issue was also rejected along with the privilege issue, which Your Honor heard a lot about, and I grant you that that -- the specific issue that I'm raising before the Court today has not been raised in the past, but I am raising it –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- frankly, not in the context of attempting to facilitate defying the court order or resisting the court order, but actually, to facilitate implementation of the court order –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- and yet, protect the financial information of participants who I think under the law deserve that protection, and I also think it acts as a safeguard, Your Honor, frankly, and this goes to the issue of the Department of Labor, and that is that the Court in its bona fide effort to enforce the law should not be the subject of manipulation by the Department of Labor where they utilize this -- the language of the statute to obtain information that ultimately there is no true investigative purpose to do so, and to see the possibility of someone going to jail over that I think is shameful.

If they want to look at this material for the purposes of determining whether or not there is a violation of ERISA do it. Just don't share that information with any other entity in order to -- that is, the participant information, in order protect the privacy rights of the individuals who are participants and ought to be protected under Gramm-Leach-Bliley.

That serves as a -- as a form of protection not only for the participants, but insures that the Government is acting in a manner that they should act –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- and not as a stalking horse for other person or agency.

THE COURT: But, Mr. Gottlieb, that's -- they're quite strong allegations you're making. I mean, you're telling me that there is four lawyers sitting there who are all officers of the court, that they really know -- you're telling me I think that they know that these plans aren't covered by ERISA, that they don't really want the documents for ERISA,

but they really want it to give to the IRS or some other agency. Is that what you're telling me?

MR. GOTTLIEB: What I'm -- what I'm saying, Your Honor, and I -- and I don't mean -- sometimes in my enthusiasm, I might go a little bit too far, but what I'm really saying is that what the Department of Labor is entitled to do is subpoena documents in order to determine whether or not there is a violation of ERISA or whether or not the plan is subject to ERISA jurisdiction.

I'm not going to ascribe a lot -- you know, bad motives, per se, but it's at least troublesome, and we have to be candid about this. It is at least troublesome that the Department of Labor has never taken the position that based upon all the knowledge that they have, that their -- that this plan is subject to ERISA. They've never said that. They've said exactly the opposite. So that begs the question as to why they want these documents.

THE COURT: Did they -- see, they never said to me that it's not covered. Am I missing something, Mr. Gottlieb? When did they say they know these plans aren't covered?

MR. GOTTLIEB: They -- they have conceded it I think from the inception that -- that based upon what they know, that it is not subject to ERISA. But –

THE COURT: All right.

MR. GOTTLIEB: -- may I just go on, Your Honor, and that is –

THE COURT: Sure.

MR. GOTTLIEB: -- to say this, that –

THE COURT: Mr. Gates, why don't you sit down and let Mr. Gottlieb speak, sir.

MR. GOTTLIEB: -- irrespective of whether it is or it is not covered by ERISA, my only point here is that it affords the participants the appropriate protection simply to issue a confidentiality order. That confidentiality order

could even include the Department of Labor coming back to the Court –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- and showing for good cause why other -- why this information ought to be distributed and then we'd have a chance to respond.

THE COURT: But have -- when is the first time you raised this issue?

MR. GOTTLIEB: In this context, I would say that the first time -- in fact, I'm not saying I'm sure that it was first raised in my memorandum to -- to the Court, and –

THE COURT: To this Court?

MR. GOTTLIEB: Yes, on Friday.

THE COURT: On Friday.

MR. GOTTLIEB: And the reason I did it is because I think we're faced with the clear -- we're at the juncture, so to speak, or the fork of the road –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- and my reading of the record is that we're here today in -- in an attempt to comply with the Court's order and which we fully intend to do so, and so I raised it, as I said, you know, not in an effort to resist honoring the order, but rather, to facilitate it and to honor.

THE COURT: Appreciate that, and Mr. Gottlieb, but you see, you said you just raised it on Friday, you know. So I don't know whether the Department of Labor will accept it or not, but Friday was just a couple days ago.

MR. GOTTLIEB: I understand that.

THE COURT: So –

MR. GOTTLIEB: But, you know, two things.

THE COURT: Yes, sir.

MR. GOTTLIEB: First of all, I called the Department of Labor on Friday and asked them if they would agree to it, and they said no. Secondly, it seems to me, Your Honor, that when we're -- when the Court is faced with the weighty issue of whether or not to incarcerate an individual for violating the order, that -- and counsel on behalf of my client comes to the Court and comes to the Department of Labor with a proposal which I think is -- is not only consis-

tent with the law but mandated by the law, that that ought to be, respectfully, the focus of what to do at this point, not what's up at the Third Circuit, what's in front of Justice Suder, but rather, what to do in response to this subpoena and comply with all applicable Federal law.

THE COURT: All right. Mr. Gottlieb, thank you, sir. Who wants to respond to all that from -- yes, Mr. Neely.

MR. NEELY: Yes. Thank you, Your Honor. First of all, we've never conceded ERISA jurisdiction. So I just want to make that point clear at the outset.

THE COURT: You never conceded ERISA jurisdiction?

MR. NEELY: Yes, with -- with respect to the investigation. I mean, we are looking for ERISA violations, and we need these documents –

THE COURT: You've never conceded no ERISA jurisdiction.

MR. NEELY: Exactly. I'm sorry.

THE COURT: All right.

MR. NEELY: And with respect to Mr. Gottlieb's suggestion that there be some sort of protective order in place, I'd just like to remind you that this issue was brought to the Court's attention back in May of 2004, and at that time, we pointed out that we cannot under Section 504 of ERISA agree to any sort of order that would prohibit our

sharing information with other -- other Federal Government agencies.

I mean, the bottom line is if -- if you're a law abiding citizen, you shouldn't care whether the information goes from the Department of Labor to the Department of Justice to the IRS, where have you. They have the documents. I've been told there is 350,000 pages worth. If they could give us those documents, at least half of them right away, the other half --

THE COURT: Uh-huh.

MR. NEELY: -- within a month, and obviously, we're willing to do what we can to get those documents, but

under no conditions can we agree to not share the documents.

THE COURT: Okay.

MR. GOTTLIEB: Your Honor, may I respond briefly?

THE COURT: If Mr. Neely is finished, but I don't know if he is.

MR. GOTTLIEB: Oh, I'm sorry.

THE COURT: That's okay. Go ahead. Why don't you sit down, Mr. Gottlieb.

MR. GOTTLIEB: I apologize.

MR. NEELY: I'd also just like to add, Your Honor, and I believe you pretty well touched on it, but respondents

are invoking the GLBA at a very late date. I mean, this is something that if they truly wanted to argue that, should have been brought to your attention in May, 2004, possibly August, 2004, but for our purposes, that argument has been waived.

Secondly, I think it's worth noting that the Koresko respondent assumes that GLBA would necessarily apply to his law firm, and there is case law -- case law which suggests that the GLBA protections do not apply to legal documents, and thirdly, Your Honor, and you alluded to it a minute ago, even if you were to somehow find that the GLBA did apply to Koresko, the exception at Section 6802(E)(8) of the GLBA would -- would apply here.

THE COURT: This is the exception for a court order.

MR. NEELY: Yeah, the disclosure of the personal -- no, not the court order.

THE COURT: Oh.

MR. NEELY: The disclosure of personal information is permitted where it is required to comply with an authorized criminal regulatory investigation or subpoena or summons by Federal, State, local authorities.

THE COURT: Yes. Well, no. That's what I meant though.

MR. NEELY: Okay.

THE COURT: The subpoena, you know, the court order that enforced a subpoena is what I was referring to.

MR. NEELY: Okay. Thank you, Your Honor.

THE COURT: Okay. Thank you, sir. Yes. Mr. Gottlieb, did you want to follow up?

MR. GOTTLIEB: Yes, please. First of all, in Mr. Nelly's statement, he acknowledged that we first raised the issue of providing the information pursuant to a protective order as far back as July of 2004. So it wasn't -- that issue, while perhaps not raised in the context of Gramm-Leach-Bliley, was issued in July, 2004, and was in the context of the privilege log.

But more importantly, I am not contending that Gramm-Leach-Bliley does not provide for a -- for an exception in terms of the response to the subpoena. Clearly, Gramm-Leach-Bliley does have a carve out language that would be -- would make it permissible for that information to be provided to the person who is subpoenaing the -- the information.

What I am saying is that the case law and common sense, frankly, clear -- but more importantly, the case law clearly provides that a protective order should be entered in order to protect against the -- the privacy rights of third individuals, and to suggest that some -- that a law-abiding citizen should have no reason to be concerned about, you know, who gets this information I think betrays the -- is completely outrageous. It is completely outrageous.

You're telling me that anyone here would not care about who gets their financial information? And probably, the one agency of the United States the people least want to hear from is the IRS.

The point is it is not about Mr. Koresko nor any of these people here. It's about the privacy rights of third parties, and all we're asking for -- all we're asking for is that a protective order be entered which would prohibit dissemination, and for the Government to say, Your Honor, that, you know, we could never enter into that agreement because -- why, because we don't. There is no rational behind that, and if the Government is unwilling to enter into the agreement, fine. Then the Court ought to order it.

THE COURT: All right.

MR. GOTTLIEB: That's the simple -- that's the simple –

THE COURT: All right. Okay. No. I understand.

MR. GOTTLIEB: -- solution.

THE COURT: Just -- go ahead.

MR. GOTTLIEB: No. That's it, Your Honor. I think that –

THE COURT: No. I hear you. Just I do think you're repeating yourself, but I do completely hear everything you're saying.

MR. GOTTLIEB: Well, maybe I am, but I am -- I wanted to reiterate what I thought was a mis -- perhaps a misunderstanding on the Government's part in terms of what our position is. We're not saying that we should not be responsive because of Gramm-Leach-Bliley.

THE COURT: Uh-huh.

MR. GOTTLIEB: I'm acknowledging that today. What I'm saying is that a protective order ought to be -- ought to be entered.

THE COURT: Okay. Yes.

MR. NEELY: Thank you, Your Honor. If I could just briefly respond. I just want to point out that the cases cited by respondent involve protective orders during the discovery process in private litigation. These don't involve orders that would prohibit a Federal agency from sharing information with other Federal agencies.

THE COURT: Okay.

MR. NEELY: Thank you.

THE COURT: Thank you very much. Mr. Gates, haven't heard from you sir, orally, I mean.

MR. GATES: Thank you. Just to follow up on something that Mark said earlier, the Department of Labor has -- has held on a number of different occasions that the -- that the -- a REAL VEBA or a VEBA is not covered by ERISA. In their own opinion, number 96-25A, they held that a VEBA was not covered under ERISA.

The Court is well aware of the fact that Community Trust Company has raised the issue of Gramm-Leach-Bliley and the Right to Financial Privacy Act strenuously. I am somewhat –

THE COURT: Yeah, but Mr. Gottlieb just said that he concedes that Gramm-Leach-Bliley is complied with if you have an administrative subpoena, although he thinks that a protective order should be issued. Is that your position too, Mr. Gates?

MR. GATES: I would disagree with Attorney Gottlieb in that matter. We believe that the -- that the Government does have a prerequisite to establish its jurisdiction. That's the very nature of the act. The act was to protect individual's privacy.

We feel that if the Department of Labor without establishing jurisdiction is -- is allowed to force us to divulge hundreds of individual's personal information, that flies in the face of the statute itself.

THE COURT: Uh-huh. But again, just to stress, the order that is at issue right now is the order that CTC would produce documents that do not have any employee names.

MR. GATES: I agree, and after further review of those documents, it would determine that the documents are replete with personal information. There would be no way to separate out –

THE COURT: But no names.

MR. GATES: Correct. It was Social Security numbers, names, dates of birth.

THE COURT: I know, but my order only applied to documents that didn't have any employee names.

MR. GATES: Correct, and I think Attorney Peterlin thought that there were documents that could be separated out that didn't have that information, and what we found was after reviewing the thousands of documents, all of them have quite a bit of personal financial information on them.

THE COURT: See, again, I don't know what that means, but I don't think I'm going to get anything more from you. Thank you, Mr. Gates. Anything more from you, sir? Anything more? Mr. Gates, I'm happy to hear you.

MR. GATES: Oh.

THE COURT: It's just that on that particular point –

MR. GATES: Okay. Sorry.

THE COURT: -- I don't know what you just said when you said they all have some kind of financial information.

MR. GATES: Correct. All –

THE COURT: This is what we went through on the phone call as well. I don't know what you're talking about, sir.

MR. GATES: Okay.

THE COURT: Because my order only related to documents that had no employee names on them. So if you're -- if you don't have any of them, then you're not in

contempt of the order, but as I understood it, you do have such documents and you have refused to give them. Is that correct?

MR. GATES: That's -- no. That's what we -- that's what I was trying to get to when –

THE COURT: Uh-huh.

MR. GATES: -- Ms. Russell was testifying was that all the documents that we have in our possession have personal information on them.

THE COURT: What does that mean, personal information? Doesn't have any names on it but it has other things?

MR. GATES: Yes. It would –

THE COURT: Okay.

MR. GATES: I was trying to get that from her –

THE COURT: You maybe should have questioned –

MR. GATES: -- earlier this morning.

THE COURT: -- a little more clearly Ms. Russell, because certainly, I at this moment do not understand what the documents are.

All right. Anything further, Mr. Gates?

MR. GATES: Yes. The Right to Financial Privacy Act is our primary thrust, and in the -- in the committee re-

ports that -- in the passage of the act, it said that the law was to protect customer financial -- customers of financial institutions from unwarranted intrusion into their financial records by Government agencies and authorities –

THE COURT: Right.

MR. GATES: -- and that the Government authorities may have access to or obtain copies of financial records or information contained in such records unless specific requirements are first met, and I think for –

THE COURT: It's the Financial Privacy Act that has in it that if someone is seeking information covered, they have to send a notice to the people?

MR. GATES: That is -- that is correct, and also, that the -- and in the -- in the case of Donovan v. National Bank of Alaska –

THE COURT: Uh-huh.

MR. GATES: -- in 1983, the Ninth Circuit clearly stated that the Department of Labor -- Donovan was at that point the Secretary of Labor –

THE COURT: Uh-huh.

MR. GATES: -- that the Department of Labor had to first establish jurisdiction. In the -- in the Donovan v. Alaska case –

THE COURT: Uh-huh.

MR. GATES: -- the Ninth Circuit overruled a subpoena that was issued gaining the very information that they are trying to get from Community Trust Company here and now.

THE COURT: No. I'm familiar with the Donovan case. I think we dealt with it before, but I guess my question to you is the Secretary of Labor doesn't know -- doesn't have names. So how can the Secretary of Labor give notice?

MR. GATES: In -- well first, if I may, Your Honor, in the Donovan case, National Bank of Alaska, the court first required the bank, the trust department to supply the Department of Labor with the primary documents. That would be the plan documents, the trust agreements, the organic documents. Those were -- were turned over to the Department of Labor to allow them to establish jurisdiction, and once that jurisdiction was established, then the Court required the financial information.

I think in this case, it's not too much to ask from the trust company's perspective to have the Department of Labor establish the fact that they actually have jurisdiction over this VEBA –

THE COURT: All right, sir.

MR. GATES: -- before we're required to supply thousands of documents and hundreds of people's information.

THE COURT: All right. Thank you. That's helpful to understand your position. Thank you very much. Any

thing more from anyone? Mr. Gottlieb, were you going to say something else?

MR. GOTTLIEB: Very -- and I will not be repeating myself. I promise.

THE COURT: No. That's all right.

MR. GOTTLIEB: First of all, just for purposes of the record, I believe that the issues that we have and that we intend to take to the Supreme Court are bona fide issues. I'm not conceding any of the issues that we -- that we had previously raised. However, that is with regard to a initial showing of jurisdiction.

However, I feel that we're -- I'm faced with the reality of this Court having jurisdiction, the Third Circuit having ruled as it has, and so I'm raising the issues in that context.

THE COURT: Uh-huh.

MR. GOTTLIEB: I don't still want there to be some allegation that we were somehow estopped from raising these issues.

THE COURT: No. I understand. Surely.

MR. GOTTLIEB: Okay.

THE COURT: Because this Court, of course, is bound by the Court of Appeals decision, and you –

MR. GOTTLIEB: Right.

THE COURT: -- the Supreme Court is not. So you're continuing to make certain arguments before them. All right.

MR. GOTTLIEB: And -- and secondly, that for purposes of this hearing today, my request would be that we be permitted to -- in order to comply with the subpoena to the extent that we -- we provide all responsive documents, accepting those documents that would reveal personal financial information and ask that the Court, if Your Honor is not prepared to rule today, take under the advisement issuing a confidentiality order with regard to that information only. That way, we can get the process rolling and start it, and the Court will have the opportunity to review the -- the argument that we made here this morning.

THE COURT: All right. But see, Mr. Gottlieb, why -- again, why I continue to not be entirely clear as to what everybody's position is, because I went through this process with Mr. Peterlin on behalf of CTC. We really tried.
Ms. Roller I know was here and Ms. Zepeta (phonetic), and we thought we had come to an agreement to give over certain documents. It sounds a lot like what you're just suggesting, but then when it came to it, no documents were given, because CTC changed its mind I thought because Mr. Koresko and Ms. Miller specifically told CTC not to. Now, that wasn't said today, but that's what was told to me on a telephone call that's on the record.

So I had always thought and thought it was always good litigation tactics for someone who's served with a subpoena, to the extent you have things you can give over, give it to –

MR..GOTTLIEB: Right.

THE COURT: -- to the secretary or to whoever is asking for it so that you appear to be acting in good faith, and then see if -- if you can negotiate with the Secretary of Labor.

So when you say you're prepared to give, I still don't know why you just -- long time ago just haven't given what you're prepared to give them so that they can see it and you can talk to them and negotiate and do all those sorts of things. It sounds like you want a commitment from them that if they take certain things, they won't want more. Is that –

MR. GOTTLIEB: No.

THE COURT: -- what you're –

MR. GOTTLIEB: No.

THE COURT: -- trying to get?

MR. GOTTLIEB: Well, first of all, I've recently gotten into the case. So I can't speak as to the history. The only thing I can say is that I made the suggestion on Friday, and my understanding was that the Government was not prepared to accept documents with that understanding, and they wanted a complete honoring of the Court's order without any type of confidentiality orders or in a piecemeal basis. Now, if I'm wrong --

THE COURT: But when you say they weren't willing to accept them, I'm sure they'll accept them. They just won't agree that –

MR. GOTTLIEB: Well –

THE COURT: -- that that's all they want, that you're in compliance. Is that right, Mr. Neely? I assume you'll accept whatever you can accept in the sense of receiving them. It's just that you will not agree that that's sufficient.

MR. NEELY: Oh, yes. We will accept, obviously, any documents that we can get, but we cannot agree to some –

THE COURT: Right.

MR. NEELY: -- protective order that would prohibit our sharing that where necessary.

THE COURT: Yeah. All right. Well, that's what I thought. Yeah. It's just that they won't accept them if there is a condition on them that you're giving them with.

All right, everybody. Anything further from this side of the courtroom? Mr. Gates.

MR. GATES: Yeah. Just simple fact, I would like to stress the fact that -- that Community Trust Company did agree to an expedited briefing and appeal schedule. We've complied so far. The briefs are set to be due here within probably two or three weeks, and I think given -- given the importance of the financial information, the Financial Privacy Act as well as Gramm-Leach-Bliley, that from our perspective, it's -- it's a small issue to ask that things be delayed until that appeal is complete, which would be fairly soon.

THE COURT: All right. There was just one remaining issue that, Mr. Gottlieb, you alluded to I think in your papers and today here as well, and I just want to be sure that I understand the answer to that question, which I thought was a legitimate question. Does the Secretary of Labor have already in their possession documents that are responsive to the subpoena? If you know what I'm saying, Mr. Neely or Ms. Roller.

I'm just getting at the notion that, in other words, if you got from a third-party -- I don't care who they are -- but six boxes of documents that are exactly what you want, then I think that would be relevant to my consideration.

MS. ROLLER: Your Honor, as you know, we are conducting an investigation, and I have to be very careful what I say –

THE COURT: Uh-huh.

MS. ROLLER: -- and not say. I can represent to the Court that we certainly do not have 35,000 pages of documents and that we still need the documents that we have subpoenaed –

THE COURT: Uh-huh.

MS. ROLLER: -- from the parties that are in front of you today.

THE COURT: All right. And as you're doing your other investigations, which I'm not going to delve into at this point, I mean, have you continued to think about whether or

not you need to press this? I take it you have and you want to continue to press it.

MS. ROLLER: That is correct, Your Honor.

THE COURT: All right. Anything else from anybody on this side?

MR. NEELY: Yes, Your Honor. I just wanted to add, obviously, there has been some discussion that the department may have been continuing with its investigation, but I think it's important to keep in mind that we're dealing with here is the trustee and plan administrator. I mean, these are the basic entities. When you're investigating under ERISA, these are the entities that you're –

THE COURT: Uh-huh.

MR. NEELY: -- typically starting with.

THE COURT: Okay. Anybody else?

MR. GOTTLIEB: Just that I don't -- respectfully, I don't believe that counsel answered your question, and that is whether or not the Department of Labor is in possession of participant, that is, employer or employee personal identification information.

THE COURT: Uh-huh. Well, that wasn't my question though, because you see, I don't know what you mean by personal identification. I mean, I -- they've asked for documents, not information, you know, not an interrogatory. So even if they have the name of every participant, I don't

think that's the same as having the documents, is it, Mr. Gottlieb?

MR. GOTTLIEB: No, it's not, but what I'm -- what I believe is -- and I can only speak on the limited information that we received -- is that they have -- they are in possession of the identity of some if not all of the participants, and when I say identity, what I'm speaking about is either the name or information through which you could easily obtain their identity.

THE COURT: Uh-huh.

MR. GOTTLIEB: In other words, Social Security number. If they have either of those two pieces of information, then they don't need that from Mr. Koresko or PennMont. They have it, and –

THE COURT: Well, if they have, why do you say that the privacy -- that there is this big privacy issue then if you think they already have it?

MR. GOTTLIEB: Well, first of all, the obvious could be stated as well, and that is why would they be urging a court to enforce an order with the ramifications of jail.

THE COURT: No. I understand, but –

MR. GOTTLIEB: So, I mean –

THE COURT: -- I'm asking you though.

MR. GOTTLIEB: But –

THE COURT: If you really think they have it –

MR. GOTTLIEB: Because it's all –

THE COURT: -- then the privacy issue is moot, is it not?

MR. GOTTLIEB: No, not as far as PennMont is concerned.

THE COURT: Why?

MR. GOTTLIEB: Because we're in possession of that information. Whether they have it from some other source is one thing.

THE COURT: Uh-huh.

MR. GOTTLIEB: We have an obligation as -- and I have an obligation on behalf of Mr. Koresko and PennMont to adhere to the privacy restrictions of Gramm-Leach-Bliley. Whether they have it –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- or not, I have to adhere to it, and –

THE COURT: All right. Okay.

MR. GOTTLIEB: So therefore, I do not believe that it -- that it –

THE COURT: Okay. All right. I appreciate that.

MR. GOTTLIEB: -- diminishes the issue.

THE COURT: But again, just the information, what I heard earlier was that your client told you that two participants got calls from Labor, the Secretary of Labor?

MR. GOTTLIEB: I think they actually were visited. At least two. Yes.

THE COURT: Okay. When you say at least two, how many were there?

MR. GOTTLIEB: Well, because I know of two.

THE COURT: We know of two. All right. But we only deal here in what we know. There are two people, and I'll accept the hearsay. I'll accept the fact that the Secretary of Labor contacted in some way two of the participants.

MR. GOTTLIEB: Yes.

THE COURT: Okay.

MR. GOTTLIEB: And as I said, I don't believe they actually answered -- well, maybe they did answer your question, but they haven't –

THE COURT: Uh-huh.

MR. GOTTLIEB: -- haven't responded to the issue that I've raised by answering that question.

THE COURT: All right, sir. Okay. Now -- no. But you see, you have information that they went to two people, and I'm accepting it. I mean, I –

MR. GOTTLIEB: Yes.

THE COURT: -- just accept that they did. I'm not even asking the Secretary of Labor to confirm it. They certainly could deny it, but I don't think that gives this Court the right to turn around to them and say tell me all about your investigation. I don't think that is appropriate, especially at this point in time with all the history we have here.

All right, everybody. If there is nothing else, I'm going to take this under advisement. If I do make a decision to incarcerate one of the respondents, I would probably give a couple of weeks to self-surrender. So that gives you some time frame to think about.

All right, everybody. Anything else?

(No verbal response)

THE COURT: Thank you very much for being here. I appreciate it. We're hereby adjourned.

MR. NEELY: Thank you.

MR. GATES: Thank you.

MR. GOTTLIEB: Thank you, Your Honor.

(Court adjourned)

CERTIFICATION

I, Maureen Emmons, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

_____ Date:

MAUREEN EMMONS
DIANA DOMAN TRANSCRIBING

APPENDIX D – PETITION FOR WRIT OF MANDAMUS, FILED JANUARY 19, 2006

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. _____

In re JOHN J. KORESKO, V, Esquire

JOHN J. KORESKO, V, Esquire,
REGIONAL EMPLOYERS' ASSURANCE LEAGUES, DELAWARE VALLEY LEAGUE, PENN-MONT BENEFIT SERVICES, INC. and KORESKO & ASSOCIATES, P.C.
Petitioners
v.
ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR
Respondent

PRELIMINARY ORDER FOR STAY RE EMERGENCY PETITION FOR WRITS OF MANDAMUS, PROHIBITION AND OTHER EQUITABLE RELIEF TO PROHIBIT FURTHER CONTEMPT PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN THE MATTER DOCKETED AT No. 04-MC-0074 AND PETITION FOR CONTEMPT OF THE ORDER OF THE HONORABLE EDWARD BECKER AND MICHAEL FISHER, JJ.

AND NOW, this ____ day of January, 2006 upon consideration of the verified allegations and exhibits in the petition, it

is hereby ordered that all proceedings in *Chao v. Koresko*, No. 04-MC-0074 (E.D.PA.) are STAYED until further order of this Court. Furthermore, this stay shall extend to proceedings against Community Trust Co. and its affiliates, including Susan Russell at No. 05-MC-0018 (E.D.Pa.)

BY THE COURT:

_____

J.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. _____

In re JOHN J. KORESKO, V, Esquire

JOHN J. KORESKO, V, Esquire,
REGIONAL EMPLOYERS' ASSURANCE LEAGUES,
DELAWARE VALLEY LEAGUE, PENN-MONT BENEFIT SERVICES, INC. and KORESKO & ASSOCIATES, P.C.
Petitioners
v.
ELAINE L. CHAO, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR
Respondent

ORIGINAL PROCEEDING EMERGENCY PETITION FOR WRITS OF MANDAMUS, PROHIBITION AND OTHER EQUITABLE RELIEF TO PROHIBIT FURTHER CONTEMPT PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN THE MATTER DOCKETED AT No. 04-MC-0074 AND PETITION FOR CONTEMPT OF THE ORDER OF THE HONORABLE EDWARD BECKER AND MICHAEL FISHER, JJ.

John J. Koresko, Esquire
Pa. I.D. # 42795
200 W. Fourth Street
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610-992-2200

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TO THE HONORABLE EDWARD BECKER, MICHAEL FISHER, AND THE JUDGES OF THE THIRD CIRCUIT COURT OF APPEALS:

Your petitioner, John J. Koresko V, for himself and the other named petitioners applies pursuant to Section 1651, Title 28, United States Code, and Rule 21(a) of the Federal Rules of Appellate Procedure, for a writ of mandamus or, in the alternative, for a writ of prohibition, and other emergency and permanent equitable relief, directed to the above-named respondent, the Honorable Elaine Chao, Secretary of Labor of the United States ("the Secretary"), and the nominal respondent, the Honorable Mary McLaughlin, Judge of the United States District Court for the Eastern District of Pennsylvania. Based on the allegations in this Petition, petitioner also moves for sanctions and a finding of contempt against the Secretary for violation of the stay issued by the Honorable Edward Becker and Michael Fisher, JJ. on August 15, 2005. In support of this application petitioner states:

I. THIS COURT HAS JURISDICTION TO ISSUE THE WRITS

1. The All Writs Act grants to the federal courts the power to issue 'all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.' 28 U.S.C. s 1651(a), 28 U.S.C.A. s 1651(a). The "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Bankers Life & Cas. Co. v.*

Holland, 346 U.S. 379, 384-85, 74 S.Ct. 145, 148-149, 98 L.Ed. 106 (1953)). If a member of the executive branch commits "any illegal act, under color of his office by which an individual sustains an injury " it "is a plain case for mandamus" to compel that officer to perform his legal duty so that "right be done to the injured individual." *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). "Once jurisdiction is established, the ability to issue writs in aid of potential appellate jurisdiction sweeps broadly, so as to comprehend the court's responsibility for the orderly and efficient administration of justice within the circuit." *New York v. U.S. Metals Ref. Co.*, 771 F.2d 796, 801 (3d Cir.1985) (quoting *Rodgers v. U.S. Steel Corp.*, 508 F.2d 152, 161 (3d Cir.1975)). This includes the right to exercise "all powers implicit in the creation of such courts." *In re Richards*, 213 F.3d 773, 780 (3d Cir. 1980) (BECKER, J.).

2. This Honorable Court has original jurisdiction because the Secretary and the Court below have ignored the clear commands of the law, articulated in the Gramm-Leach-Bliley Act 15 U.S.C. §6810, the Heath Insurance Portability and Accountability Act of 1996 (August 21), Public Law 104-191, as implemented in 45 CFR Parts 160 – 164 ("HIPAA"), and ERISA § 504. Additionally, the Secretary has blithely ignored her own regulations. In so doing, both the Secretary and the District Court have exacted severe monetary punishment, and now, in five days, seek to incarcerate an attorney who simply refuses to violate federal statutes in accordance with his duties as a lawyer to his clients, society and the institution of justice.

3. This Honorable Court has personal jurisdiction over its judges and the attorneys, like petitioner, who practice in its courts and are members of its Bar. The United States and other parties are subject to this court's jurisdiction as this matter concerns a federal question.

4. Petitioner is mindful that a Writ of Mandamus is a drastic remedy and is invoked only in extraordinary circumstances. *Kerr v United States District Court for the Northern District of California,* 426 U.S. 394, 96 S.Ct. 2119 (1976). A Writ of Mandamus is appropriate where the party seeking issuance has no other means to obtain relief and demonstrates that there is a clear error of law. *Allied Chemical Corp. v Daiflon, Inc.* 449 U.S. 33, 36, 101 S.Ct. 188, 190 (1980); *Sporck v Peil*, 759 F2d 312 (3rd Cir. 1985). Petitioner asserts in good faith that it has no other remedy.

II. STATEMENT OF FACTS

5. The facts in this matter have been set forth at length in petitioners' appeals docketed at *Chao v. Koresko.* No. 04-3614 in this Court. The record in that case is incorporated herein by reference. A short recap and supplement follow below.

6. This case originated as a subpoena enforcement action filed by the Department of Labor (DOL). DOL wanted to conduct an investigation of persons and entities alleged to be connected with multiple employer welfare benefit trust called Regional Employers Assurance Leagues (REAL) Voluntary Employees Beneficiary Association (VEBA)

7. The Secretary of Labor served an administrative subpoena upon Petitioner John Koresko, Esquire and his law

firm Koresko and Associates, P.C. who are the legal counsel to PennMont Benefit Services, Inc. and two informal unincorporated associations of employers: The Delaware Valley Leagues and REAL. In a related action, the Secretary served a virtually identical subpoena on Community Trust Company, the trustee of REAL VEBA.

8. The Agents of DOL have stated in open court and in private conversations with counsel that they have no information regarding Mr. Koresko his law firm or his clients that would indicate any violation of ERISA. However, DOL asserts it has the right to issue a subpoena under ERISA §504.

9. DOL issued administrative subpoenas in February 2004. Following a response by Petitioners, DOL filed a petition to enforce the subpoenas in the District Court at No. 04-mc-0074. The Koresko parties challenged the subpoenas on numerous grounds: the DOL exceeded its authority under ERISA §504; the information sought was and is privileged or attorney work- product prepared in anticipation of litigation; the DOL did not have jurisdiction over the parties or entities since the welfare benefit trust(s) involved are not employee welfare benefit plans described in ERISA §3(1); and federal privacy statutes, including HIPAA, the Right to Financial Privacy Act ("RFPA"), and the Gramm-Leach-Bliley Act ("GLB"), prohibited the Koresko parties from giving DOL access to the requested information in the absence of DOL's demonstration of authority, good faith, and jurisdiction. The District Court did not address these issues, although the court spoke in its orders only to the various claims of privilege. Even then, the district court rejected the claims of privilege due more to dissatisfaction with the form of privilege logs than anything else.

10. Petitioner filed a timely appeal to this Court. On December 23, 2004, the Department of Labor filed a renewed motion for adjudication of civil contempt. A Response was timely filed and the matter proceeded to hearing on January 7, 2005. On January 10, 2005 the District Court issued its order which in pertinent part provided that (a) upon a denial of the Motions for Stay then pending in the Circuit Court of Appeals, the Koresko parties were in contempt and must comply with the August 23, 2004 Order; and (b) assessed prospective fines of $250.00 per day for each day there was no compliance.

11. Petitioners' Notice of Appeal of the January 10th contempt order was filed on February 9, 2005. On February 25, 2005 the Department of Labor filed a Motion for Incarceration of John Koresko. At a hearing convened March 16, 2005, the court took the motion for incarceration "under advisement." Circuit Court Judges Becker and Fisher granted a stay of proceedings on August 15, 2005.

12. A panel of this Court issued a ***non-precedential*** opinion on October 12, 2005. [Rendell, J.]. On December 28, 2005 this court issued its mandate to the district court. The Koresko parties on January 9, 2006 filed a Motion to Recall Mandate and to Stay the Mandate Pending the Petition for Certiorari. As of this date that Motion is pending. The opinion of October 12 addressed no issue connected with the Gramm-Leach-Bliley Act 15 U.S.C. §6810, the Right to Financial Privacy Act, HIPAA's privacy protections, ERISA § 504, or the inconsistency of the Secretary's actions with its regulations.

III. STATEMENT OF EMERGENCY ISSUES

A. An Innocent Attorney faces Imminent and Wrongful Incarceration

13. On January 23, 2006, the district court intends to hold a hearing on the Secretary's Motion to Incarcerate petitioner [Exhibit 1]. Petitioner, a lawyer, whom the district court held responsible for the acts of the other petitioners, is threatened with incarceration for refusing to violate federal laws, to wit: the Gramm-Leach-Bliley Act 15 U.S.C. §6810, the Right to Financial Privacy Act, HIPAA , and ERISA § 504. Petitioner asserts that the district court has refused to consider the plain language of these statutes and rules in both fining petitioner over $20,000 and subjecting him to continuing risk of incarceration.

B. The Secretary and the District Judge refuse to abide by federal law

14. Petitioner further asserts that the Secretary has refused to abide by the Acts of Congress aforesaid, and has ignored its own regulations that when read in conjunction with ERISA § 504 prohibit the Secretary from obtaining the information, which petitioner asserts is also protected by statute. At a previous hearing, when the district court assessed the fines and took incarceration "under advisement" [Exhibit 2] the district judge summoned several United States Marshals for the purpose of either influencing petitioner's decision or hauling him off to jail. On information and belief, petitioner believes the district judge will again summon Marshals to seize petitioner. Petitioner's liberty is at risk.

C. Corruption of the process by the Secretary's bad faith, violation of this Court's previous stay, contempt, and failure to be candid with the district court

15. Petitioner has discovered new evidence tending to show that the Secretary disregarded this Court's previous stay Order entered August 15, 2005 [Exhibit 3], and has pursued contempt fines and incarceration in bad faith. **On information and belief, the Secretary is therefore in contempt of the Order of Judges Becker and Fisher, entered August 15, 2005, which stayed ALL proceedings related to the matter below.** The district court, ignoring the statutes cited above and following old law, has previously ruled that petitioner has no right to submit a "substantive defense" in a subpoena enforcement hearing. The district court has refused to allow petitioner to obtain evidence from the Secretary or to examine DOL employees, despite the apparent command of the Supreme Court that bad faith is a defense to subpoena enforcement as it goes to the rightfulness of the Secretary's acts.

16. On information and belief, the Secretary possesses the information petitioner refused to supply. The Secretary's employee, Fred Siegert, has in the last week contacted two of petitioner's clients. Petitioner obtained this information from clients who had previously demanded that petitioner not disclose their identities.

17. The Secretary has further violated her duty to defend and obey the laws of the United States by failing to notify the district court that she has obtained information she allegedly sought from petitioner, and on that deceptive premise,

threatened the liberty of petitioner in violation of the Fifth and Fourteenth Amendments of the Constitution.

18. The Secretary has now compounded her contempt of the statutory law and her own regulations by continuing its proceedings in bad faith. The process below has been corrupted by indirect contempt of this Court's previous stay, and is not reviewable in the district court. Review only exists here. The Secretary has obtained information that petitioner refused to disclose pursuant to GLB, RFP, and ERISA. See Affidavit of John Braddock, Exhibit 4.

19. The Secretary served subpoenae on various insurance companies and banks, and under color of office demanded that those recipients disclose protected and confidential client identifying information, including medical information in insurance applications clearly covered by HIPAA's privacy protections. On information and belief, the Secretary has succeeded in compelling at least two sources to violate the GLB and HIPAA.

20. Despite these activities, and apparently obtaining all information it sought from petitioner, the Secretary HAS NOT informed the district court of its information acquisitions or activities. It is hornbook law that investigative subpoenas are not enforced if the information is already in the government's hands.[1]

---

[1] To obtain enforcement of an administrative summons, the IRS must establish that (1) the investigation will be conducted for a legitimate purpose; (2) the inquiry is relevant to that purpose; ***(3) the material sought is not already within the government's possession;*** (4) the administrative steps

D. The Secretary has changed her subpoena procedures to comply with the RFPA, thus proving that petitioner has not been in contempt and should not have been fined or threatened with incarceration.

21. More disturbingly, the Secretary served a subpoena on petitioner's own bank, Commerce Bank, N.A., to obtain petitioner's private financial data. There is no basis for invasion of petitioner's financial privacy by the Secretary. See Exhibit 5. When compared with the subpoena served on petition, see Exhibit 6, something most startling appears. The latter subpoena contains the following language:

> **Please Note: If any account that is responsive to this subpoena is maintained in the name of an individual or a partnership of five or fewer individuals, please do NOT produce the documents relating to the account at this time. Instead, please provide only the name in which the account is maintained, so that we may comply with the notice requirements of the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq.**

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required by the Internal Revenue Code and applicable regulations have been followed; and (5) no criminal referral regarding the taxpayer's case has been made to the Department of Justice. United States v. LaSalle Nat'l Bank , 437 U.S. 298, 318 (1978); United States v. Powell , 379 U.S. 48, 57-58 (1964). The government's burden is slight; an affidavit from the IRS agent issuing the summons is generally sufficient to meet that burden. United States v. Balanced Fin. Management, Inc. , 769 F.2d 1440, 1443 (10th Cir. 1985).

22. It now appears that the Secretary has changed its administrative procedures **and expressly adopts as genuine the arguments advanced by petitioner** regarding application of the Right to Financial Privacy Act, with which the GLB protects individual financial privacy. Still, according to the district court and the Secretary, there is no substantive argument in a subpoena enforcement proceeding below that would permit this clear evidence that your petitioner was always been law-abiding and never in contempt.

23. The Secretary has advised neither this Court [in its opposition to withdrawal of the mandate and stay] nor the district court of this change of administrative procedure. Accordingly, the Secretary seeks incarceration and continued fines against petitioner based upon on false and frivolous premises. See, Rules of Prof Conduct 3.3. (duty of candor to tribunal). This Court appears to be the only tribunal capable of securing justice for petitioner by exercising jurisdiction under the All Writs Act.

E. Petitioner faces incarceration despite the Secretary's refusal to accept petitioner's tender of information.

24. The threat against petitioner's liberty, and the continued fines, all ensue from illegality, bad faith, or inaccurate citation of precedent. Petitioner is being punished although the Secretary has REFUSED petitioner's tender of information the Secretary said it did not have. Throughout the action, petitioner actually delivered documents, and repeatedly offered to the Secretary the information she requested except for client names. The Secretary repeatedly REFUSED production in this way. At the hearing when fines were imposed

and Marshals appeared [Exhibit 2], petitioner offered ALL the information to the district court, subject to the express provision of *Haines*, infra, that compels the district judge to hold the information under seal. When questioned by the judge, DOL stated that this was not acceptable. It is grossly inequitable to place petitioner at real risk of incarceration when the Secretary rejected petitioner's good faith attempts to comply with the law while not compromising his duties to clients and society under the Rules of Professional Conduct and the statutes of the United States.

F. The district judge has refused to decide statutory issues of first impression that would free petitioner, despite knowing of the issues for over a year

25. Although having had the opportunity to decide the grave statutory questions, which are of first impression in this Circuit if not the country, the District Court admits it ignored them. The court said publicly that *it has not considered Gramm-Leach-Bliley*, [Exhibit 7] despite a year of litigation, accruing fines approaching $30,000, and petitioner's repeated argument that the plain language of the statutes prevented petitioner from performing acts ordered by the court.

G. The subpoena enforcement proceeding below has been held not subject to any substantive arguments, thus rendering the substantive matters in this petition perhaps unripe for appeal, and without a remedy except mandamus, prohibition, or equitable relief issuing from the Circuit Court.

26. The Secretary filed a brief in this Court, in opposition to petitioner's Motion to Withdraw the Mandate in case no.

04-3614, *Chao v. Koresko*, stating that the statutory issues raised by petitioner herein were not addressed by either the district court or a panel of this Court. [Exhibit 8]. Exhibits attached to the present petition appear to show otherwise, but **petitioner is caught in a legal web that apparently makes the ultimate issue unripe and thus unreviewable.** If the Secretary is incorrect in its contention, then petitioner has no remedy to prevent his incarceration other than to break the law. If the Secretary is correct, and this Court denies relief, then there is no present avenue of appeal to the Supreme Court.

27. The Secretary asserts that its subpoena enforcement proceeding escapes any substantive evaluation under existing precedent. Effectively, the Secretary argues that it may violate the law until such time as it decides to file an actual case under ERISA sec. 502, although the precedents appear to compel a prior demonstration of good faith as a condition of any pre-litigation administrative subpoena.

28. In the meantime, while noting the argument that bad faith is a factor to be considered, the district judge prevented petitioner from any examination of witnesses and any forum to prove the bad faith or substantive illegality of the Secretary's predicate acts. This appears to have contradicted *United States v. Powell,* 379 U.S. 48, 58 (1964) (the court must allow taxpayer to prove any abuse of the subpoena process at an "adversary hearing").

29. Under the views adopted by the Secretary and the district judge, the right of appellate review of the grave issues does not exist because [they say] there is no right of

substantive objection that would give rise to an issue to be preserved on appeal.

30. If the district judge and the Secretary persist in their position that neither GLB nor other statutes need be obeyed, petitioner faces incarceration for refusing to violate the law. Although petitioner would have some subsequent remedy to escape his prison cel, like habeas corpus, his constitutional right to his reputation and privilege to practice law will have been damaged irreparably. AMENDMENT XIV, U.S. CONST.; PENNA. CONST. ART I, SECS. 1, 24. Such a remedy is the equivalent of no remedy for an officer of the court who honestly advances the plain language of statutes, not some contrived interpretation. One cannot undo disclosure, just as one cannot undo the experience of imprisonment. The prospect of sanctions for an attorney, who asserts in good faith his belief in his duty to withhold information, has been held sufficient irreparable harm to evoke the jurisdiction of this Honorable Court in a mandamus proceeding. *Glenmede Trust Co. v. Thompson*, 56 F.3d 476 (3d Cir. 1995) ("mandamus is an appropriate means of immediate appellate review of orders compelling the production of documents claimed to be protected by privilege or other confidentiality interest"); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 84 (3d Cir. 1992)("The attorney-client privilege is not without its costs. *Cf. Trammel v. United States*, 445 U.S. 40, 50 (1980)"). *See Marbury v. Madison, supra* ("[W]here a specific duty is assigned by law [to agents of the executive], and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy. . . .")

31. When an individual challenges the District Court's action or lack thereof under changed statutory requirements, the individual may do so by filing a mandamus action under this Court's original jurisdiction to examine whether such statutory requirements have been altered in such a way as to result in a constitutional violation. Petitioner, who has made a good faith challenge to the exercise of the Deportment of Labor's authority to subpoena statutorily protected, private, client financial information, now faces incarceration for seeking to abide by the requirements of a federal statute. Fundamentally, the Gramm-Leach-Bliley Act, 15 U.S.C. §6801 et seq. is in conflict with ERISA §504. The District Court despite presentation of this issue has declined to rule or provide any guidance. The District Court intends to impose the most severe sanctions for a contempt order that may be void *ab initio*

REASONS WHY THE WRIT SHOULD ISSUE

A. These are undecided issues of first impression, and no lawyer should be incarcerated under such circumstances.

32. The gravamen of this case is whether or not the Gramm-Leach-Bliley Act, 15 U.S.C. §6801, et seq. and the Right to Financial Privacy Act 12 U.S. C. §3401 et seq. and the United States Supreme Court's decision in *U.S. v Mead Corp.* 533 U.S.218 (2001) impose an affirmative duty upon the Department of Labor to establish jurisdiction and compliance with privacy statutes before an attorney [whom DOL asserts is a plan administrator] or any other person must disclose client identifying information. At no time has DOL established any jurisdiction over the parties. If DOL had no

jurisdiction, the district court acquired no jurisdiction, thus making the contempt citations void. A circuit court may at any time consider the question of jurisdiction.

33. The statutory authority of the Department of Labor under ERISA §504 has been modified by the operation of the financial privacy statutes noted above, thus rendering prior reliance on *FTC v Morton Salt,* 334 U.S. 37, 68 S.Ct. 822 (1948), *U.S. v. Powell,* 379 U.S. 48 (1964) (citing *Morton Salt),* and subsequent decisions improper [except in IRS summons enforcement, where jurisdiction almost always exists]. Finally, ERISA § 504 permits the Secretary to obtain in a pre-litigation setting only that information that would have been reportable to the Secretary. The Secretary's own regulations exempt the information sought by the Secretary in this case from reporting. Consequently, the Secretary's subpoena sought information that petitioners were not compelled to surrender. This made the Secretary's subpoena enforcement proceeding prima facie in bad faith, and the district court's countenance of the Secretary's position incorrect as a matter of law. These questions have not been addressed by the District Court or the Third Circuit Court of Appeals.

B. The same issues have been raised on appeal to this court in another case, so judicial economy would be served; incarceration and continued fines must be questioned if another independent litigant holds the same views as petitioner.

34. At present, these questions are before this Court in the appeal of Community Trust Company in the matter if *Chao v Community Trust Company* at No. 05-4828 and 05-

2785. Although the same issues were raised by the amicus brief of Community Trust and the Petition for Rehearing *en banc* in the appeal of John Koresko in the matter of *Chao v Koresko*, et al. No. 04-3614, the Court of Appeals did not address the questions on their merits.

C. A stay of continued fines and incarceration preserves the petitioner's substantive rights to appeal and to be free from arbitrary punishment

35. In the above noted Koresko Appeal, this Court denied the request for hearing *en banc* on December 20, 2005. It is the intention of the Koresko parties to submit a Petition for a Writ of Certiorari to the Unites States Supreme Court.

D. There is no other available remedy.

36. The strange state of the law in this Circuit has resulted in a most unfortunate anomaly. Precedent appears to indicate that subpoena enforcement proceedings are to be unencumbered by substantive issues, but changes in the law now compel a substantive review. A district court adhering to *stare decisis* has no basis upon which to consider *the substantive argument* that substantive arguments are now permitted in subpoena enforcement proceedings. Such issues cannot, therefore, be preserved for review, and are in effect unappealable. Mandamus, prohibition, and injunction are the immediate remedies to prevent a court from putting an innocent man in jail and stating the current law based upon the changed statutory landscape. There is also no other remedy by which the Secretary can be compelled to cease using the apparent power of her office to induce citizens to violate federal privacy statutes by demanding information she is not

entitled to get. Finally, only this Court has jurisdiction to determine whether DOL's actions in continuing information gathering against petitioner and his clients constitute contempt of the stay order granted on August 15, 2005.

V. LEGAL ARGUMENT IN SUPPORT OF RELIEF

Judge McLaughlin has severely fined John Koresko and now seeks to impose a sanction of incarceration on him despite the open question of whether or not subject matter jurisdiction exists under the Gramm-Leach-Bliley Act and other federal statutes. As a general proposition the District court is presumed *not* to have jurisdiction until it is demonstrated that subject matter jurisdiction exists. *Trent Realty Associates v First Federal Savings and Loan Association of Philadelphia,* 657 F2d 29, 36 (3rd Cir. 1981). The burden to establish jurisdiction is upon the party invoking the power of the federal court. *Pjepscot Industrial Park, Inc. v Maine Central RR Co.,* 215 F3d 195 200 (1st Cir. 2000). Here, the district court cannot have jurisdiction to enforce a subpoena the DOL does not have jurisdiction to issue.

A. GRAMM-LEACH-BLILEY and RIGHT TO FINANCIAL PRIVACY ACTS apply to purge petitioner of contempt

GLB, which was effective November 1999, provides that jurisdiction be established before personal financial information is disclosed. In expressing its intent Congress stated:

> "...the policy of Congress [is] that each financial institution has an affirmative and continuing obligation to respect the privacy of its consumers and to protect the security and confidentiality of those

consumers' nonpublic personal information." 15 U.S.C. §6801(a)

Most importantly GLB is very clear as to what requirements are imposed upon a financial institution and on the government agency.

Notice requirements

(a) Except as otherwise provided in this subchapter, a financial institution shall not disclose to a nonaffiliated third party any nonpublic personal information, unless such financial institution provides or has provided to the consumer a notice that complies with section 6803 of this title.

(b) Opt out

(1) In general -- A financial institution may not disclose nonpublic personal information to a nonaffiliated third party unless -

(A) such financial institution clearly and conspicuously discloses to the consumer, in writing or in electronic form or other form permitted by the regulations prescribed under section 6804 of this title, that such information may be disclosed to such third party;

(B) the consumer is given the opportunity, before the time that such information is initially disclosed, to direct that such information not be disclosed to such third party; and

> (C) the consumer is given an explanation of how the consumer can exercise that nondisclosure option. (15 U.S.C. §6802)

Section 6803(4) defines "nonpublic personal information" as "personally identifiable financial information (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or **(iii) otherwise obtained by the financial institution**. Consumers have the right under the Act to prevent disclosure of personal financial information. [emphasis added]. 15 U. S. C. sec. 6802(b)(1)(B).

GLB at Section 6802(e) provides exceptions to the prohibition on disclosure. Only one is implicated here:

> (8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a *properly authorized* civil, criminal, or *regulatory investigation or subpoena* or summons by Federal, State, or local authorities; or *to respond to* judicial process or *government regulatory authorities having jurisdiction* over the financial institution for examination, compliance, or other purposes as authorized by law.

(Pub. L. 106-102, title V, Sec. 502, Nov. 12, 1999, 113 Stat. 1437.)

The exception at paragraph 8 cannot apply. Whether the subpoena is "properly authorized" is the core of this case. "Properly authorized" contemplates that ERISA § 504 allows the Secretary to obtain the information. Clearly, the Department of Labor is a government regulatory authority, but

the Department does not have jurisdiction for examination of the records of REAL VEBA or the other parties. DOL certainly did not prove its jurisdiction below. By the express terms of the Act, Plaintiff is entitled to refuse disclosure unless and until it is proven that the exceptions of the Act apply to the Department of Labor.

In the case at bar there has been no showing by the Department that the DOL or financial institutions have given notice to anyone. More importantly each potentially affected consumer through their attorney in fact, John Koresko, has commanded that there be no disclosure. Accordingly, the petitioners and other financial institutions involved in this case [and who DOL subpoenaed] are under a very clear statutory mandate not to disclose any nonpublic consumer financial information.

The GLB Act clearly expresses Congressional intention that investigations that are no more than fishing expeditions are no longer legal. The Act expressly impacts prior case law relied upon by the Department of Labor in other enforcement actions, that questioned whether jurisdiction should first be proven before a district court enforce an administrative subpoena. Previously the Department of Labor could, under the guise of ERISA §504, apparently rip apart virtually anyone's business, get confidential information, disclose it without limitation, and simply apologize if it did not have jurisdiction.

The Department of Labor in enforcement actions has relied on *Dole v Trinity Industries*, 904 F2d 867 (3rd Cir. 1990). In *Dole* this Circuit applied the standards for the enforcement of an administrative subpoena as set forth in *U.S.*

v Morton Salt Co., 338 U.S. 632, 94 L.Ed. 401 (1950). On this basis the Department of Labor has taken the position that there is no requirement to take preliminary steps to establish jurisdiction. Glaringly absent from DOL's argument is that these rulings substantially pre-date the 1999 enactment to GLB. DOL may not like it, but Congress has imposed a statutory requirement that adds the jurisdictional requirement to issuance of an administrative subpoena. It is not illogical for Congress to protect the right to privacy from arbitrary invasion.

Both the district court and the Secretary failed to respect the Right To Financial Privacy Act (RFPA) 12 U.S.C.§3401 which GLB relies upon and is, in fact, a companion law. The RFPA prohibits any agency or department from obtaining from any financial institution (as defined by the RFPA) a customer's private financial information without prior consent. There are exceptions to the prior consent provisions that include administrative subpoenas. This, however, is an exception that is subject to specific limitations.

Under 12 U.S.C. §3405 a government authority may obtain financial records protected by RFPA pursuant to administrative subpoena only if (1) there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry and (2) a copy of the subpoena has been served upon the customer or mailed to his last known address on or before the date the subpoena was served upon the financial institution together with a notice stating with specificity the nature of the law enforcement inquiry.

This statute along with the Act must be construed *in pari materia* with ERISA §504.[2] Thus there exists a statutorily prescribed jurisdictional requirement for the Department of Labor. A financial institution is strictly and clearly prohibited from releasing private financial records until the requirements under §3405 are satisfied. 12 U.S.C. §3403 (b). There is no basis to exempt the Department of Labor.

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[2] The inquiry begins with the language of the statute, *see Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991), which "must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980). "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani*, 502 U.S. at 135-36, 112 S.Ct. 515 (citation omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981)). In the absence of that rare and exceptional circumstance, "we are bound to take Congress at its word." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S.Ct. 838, 841, 139 L.Ed.2d 849 (1998). *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1035 (3d Cir.1991) ("It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.'") (quoting *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)). (internal quotations omitted).

Nowhere does ERISA sec. 504 state that a subpoena can be issued without first proving jurisdiction and authority of an agency in a particular matter. Neither GLB's nor the Privacy Act's addition of a prerequisite proof of jurisdiction conflicts with the investigative authority granted to the Department of Labor. The statutes taken together make clear, however, that the Department cannot violate the privacy of anyone it wants to bother.

Finally, as shown in Exhibits 5 and 6, DOL changed its subpoena during the course of this case to reflect petitioners' RFPA position. To continue to assert noncompliance is simply bad faith. It is clear evidence that answers to the subpoenas were not authorized or mandated. There is a failure of jurisdiction and, as noted, no burden should be imposed on petitioners. Any previous penalty for contempt was error.

B. The DOL admits that it does not have jurisdiction, and two district courts agree

A most remarkable aspect of this case is that the DOL has advanced a consistent litigation position for 15 years that multiple employer trusts (MET) like REAL VEBA, which are not controlled by employers or employees, are not ERISA plans at all. *See, e.g.* DOL Op. No. 96-25A, 1996 WL 634362, at *3. DOL has consistently stated that unless the MET is under the control of the employers/employees, it is not an ERISA plan and accordingly does not fall within the review of certain provisions exercised herein. *Gruber v. Hubbard Bert Karle Weber, Inc.*, 159 F.3d 780, 787 (3d Cir. 1998) (citing DOL Op. No. 96-25A, 1996 WL 634362, at *2-3 (E.R.I.S.A. Oct. 31, 1996)); *MD Physicians & Associates Inc. v. State Board of Insurance*, 957 F.2d 178 (5th Cir. 1992) (*Amicus Curiae* – U.S. Secretary Of Labor); *Taggart Corp., v. Life & Health Benefits Admin. Inc.*, 617 F.2d 1208, 1210 (5th Cir. 1980); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir.1982); *Finderne Management Company, Inc. v. Barrett*, 355, 809 A.2d 842 (N.J. App. Div. 2002) (*Amicus Curiae* United States Department of Labor). If the arrangement is not an "employee benefit plan" described in ERISA, DOL has no jurisdiction and no power to employ ERISA § 504 against petitioners.

In usual circumstances an administrative agency seeking judicial enforcement of its subpoena must examine the relevant records to determine its jurisdiction and coverage of the entity and information sought. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 214 (1946). However, this matter is not the norm because two federal courts have already reviewed relevant records and determined that these plans/trusts are not employer/employee controlled. Furthermore, the Respondents/Appellants in the Eastern District case produced those records to DOL and DOL nevertheless refused to review them, instead rushing to enforce the administrative subpoenas. DOL has the same records upon which the two federal courts previously based their determinations that the plans were not controlled by employers or employees.[3] (Third Circuit Reproduced Record 102a -103a).

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[3] In May of 2000, an employer Sidney Charles Markets (SCM) its principal Michael Zimmerman ("Zimmerman") and the widower of a deceased SCM employee, Craig Waitt ("Waitt"), sued Penn-Mont in the District Court in New Jersey. (SCM, et al. v. Penn-Mont Benefit Services, et al., No. 00-2134 [The "New Jersey Action"]). SCM and Zimmerman sought the return of SCM's contributions to the Delaware Valley Leagues ("DVL") VEBA trust, an accounting, and a constructive trust preventing the use of any plan funds for the payment of legal fees. (Hutton, J. slip op., at 4). (Third Circuit Reproduced Record 1347a). Waitt sought any proceeds generated by his late wife's death. (Id.). Judge Bassler dismissed the New Jersey Action on March 28, 2002, on several grounds, noting that authority and/or control was vested exclusively in Penn-Mont as plan administrator, and finding it "indisputable" that the plan and trust were not controlled by the employer or its employees. (Bassler, J. slip op., at 6). (3d Cr. R.R. at 1372a). SCM was the only employer from the DVL not to join

Nevertheless, DOL argues its needs further records such as insurance applications containing private medical information, but what they really want is the identity of a lawyer's clients. DOL failed to advise the District Court that a threshold determination can be made pursuant to the plan and trust documents, and the documents already produced in Philadelphia, which are already in the possession of the DOL. The two federal courts that reviewed the documents already produced for the DOL found they were sufficient for a determination as to whether the plan/trusts were employer/employee controlled. Both courts determined independently that the DVL VEBA and REAL VEBA are not employer/employee controlled (J. Bassler Slip Op., at 6). (3d Cir. R.R. at 1372a). Under the DOL's own internal procedures, the two District Court's rulings about the DVL VEBA and REAL VEBA preclude the DOL's sweeping requests.

REAL VEBA when DVL folded in 1995. In a related action REAL VEBA, et al. v. SCM, et al., No. 01-4693, U.S.D.C. E.D.P.A. (the "Pennsylvania Action"), PennMont sought a declaratory judgment that the REAL VEBA Plan provisions are valid and that PennMont's actions had not breached those provisions. In May of 2002, SCM filed counterclaims "identical to the claims defendants raised in their complaint as plaintiffs in the New Jersey Action." (Hutton, J. Slip Op.). (3d Cir. R.R. 1347-48a). The counterclaims added certain SCM employees as plaintiffs. Finding Judge Bassler's Opinion persuasive, Judge Hutton dismissed all counterclaims on January 29, 2003. (Id.).

C. The development of the right to privacy since 1974 and the constitutional right to reputation supersedes DOL's rights to investigate pursuant to an older statute

The Department of Labor's actions implicate the law of privacy that has developed following the enactment of ERISA § 504 in 1974. Any action of a federal agency that violates legitimate expectations of privacy as a result of arbitrary and capricious actions by lower level governmental employees violates the Fourteenth Amendment's protections. *See Schieber v. City of Philadelphia*, 320 F.3d 409, 417 (3d Cir. 2003) quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). ("'the touchstone of due process is protection of the individual against arbitrary action of the government.' " *Id.* at 845, 118 S.Ct. 1708). The Department of Labor had no right to subject the records of other people to unrestricted invasion as an instrument of revenge for challenge to their subpoena power. Laws are not supposed to be used for such purposes. Fiduciaries have the right not to be subjected to such abusive use of the legal system.

The powers DOL seeks to exercise against the petitioners and its clients are incompatible with the concepts of ordered liberty enunciated by the Third Circuit and the Supreme Court. *See Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 110 (3d Cir. 1987) ("[i]t would be incompatible with the concept of privacy and ordered liberty to permit protected medical, financial and behavioral information . . . to be publicly disclosed." *Id.* at 118. Section 504 of ERISA and its failure to include any procedural safeguards against disclosure or malfeasant use of confidential tax and

financial information cannot stand up to modern constitutional scrutiny. The threat to breach some confidential aspect of one's life then is tantamount to a violation of the privacy right because the security of one's privacy has been compromised by the threat of disclosure. *Scheetz v. Morning Call Inc.*, 946 F.2d 202 (3d Cir. 1991) (financial records within the zone of privacy); *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (collecting cases affirming right to privacy).

In its attempt to cause persons to breach the confidences of beneficiaries and violate federal privacy acts, DOL's investigator Fred Siegert made a sworn statement in court that *"his investigation cannot continue without the requested records."* Petitioners now know that this statement is more hyperbole and boilerplate than it is truth. DOL has already done quite a bit in its investigation by continuing to investigate while this Court's stay was pending. More importantly, petitioners offered to give DOL all financial information it requested, so long as names of clients and beneficiaries were redacted! DOL refused this reasonable compromise to protect privacy rights! This matter has not in any way been about NOT producing anything. It is about not producing identities so as to accomplish the ends of federal law and prevent the uninhibited destruction of the reputations of the petitioners, including a lawyer, by unfounded "investigations" by a government agency without jurisdiction.

But there is as great a matter to consider. Just the existence of an investigation, no matter how ridiculous, is enough to harm a reputation of a lawyer. In this state, everyone has a right to their reputation, and the constitutional right to protect it. Pennsylvania Constitution, Article I, sec. 1, 24. The

response of courts should be to demand proof of the rightfulness of any investigation and invasion of privacy prior to subjecting anyone's reputation to damage.

D. The plain language of ERISA § 504 shows that the Secretary is entitled to no documents from petitioners.

ERISA § 504, by its plain language, also prevents the DOL's inquiry in this case. That section in pertinent part states the following:

> The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation or order thereunder--
>
> (1) to make an investigation, and in connection therewith to require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and
>
> (2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation,
>
> if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder or if the entry is pursuant to an agreement with the plan.

The plain language of the statute limits DOL's inquiry to information "in support of any information required to be

filed with the Secretary." In other words, if there is no filing requirement, there is nothing for DOL to subpoena under ERISA §504. Obviously, if petitioner is correct and DOL has no jurisdiction over REAL VEBA, there would be no requirement to file anything with the Secretary. PETITIONER would be absolutely correct in its position.

As important are the DOL's own regulations and reporting requirements. DOL is well aware that REAL VEBA is a fully-insured group death benefit insurance arrangement. Even if the individual benefit structures under REAL VEBA were considered plans, all of them have only a few participants. The request for disclosure of the names of plan participants as well as a list of an attorney's clients is at complete odds with the Department of Labor's own reporting requirements and ERISA sec. 504. Pension and welfare benefit plans generally are required to file an annual return/report, the Form 5500 Series, regarding their financial condition, investments, and operations, unless exempted by ERISA or regulations promulgated thereunder. The annual reporting requirement is generally satisfied by filing either the Form 5500 or 5500-C/R and any required attachments. (29 USC §1023). The Department of Labor and Internal Revenue Service jointly developed the Form 5000 and Form 5500-C/R so employee benefit plans could utilize the Form 5500 Series to satisfy annual reporting requirements under Title I and Title IV of ERISA and under the Internal Revenue Code. *United States v Coyle*, 63 F.3d 1239 (3rd Cir. 2002). Nowhere on a Form 5500 is there any requirement for providing individual names. Moreover, PETITIONER with respect to its relationship with Penn-Mont and REAL VEBA, is expressly exempted from filing annual reports

with the Department of Labor for REAL VEBA or the benefit arrangements thereunder. 29 CFR §§ 2520.104-21 (limited exemption for certain group insurance arrangements); 2520.104-20 (limited exemption for certain small welfare plans); 2520.104-43 (exemption from annual reporting requirement for certain group insurance arrangements). There is no information reportable to the Secretary. ERISA §504 gives DOL no subpoena authority in this situation, and it certainly gives the DOL no authority to obtain client identity information that is not reportable.

Finally, ERISA § 504 clearly violates the Heath Insurance Portability and Accountability Act of 1996 (August 21), Public Law 104-191, as implemented in 45 CFR Parts 160 – 164 ("HIPAA"). Section 504 allows the Secretary to turn over any information it receives to others, including the complainant. The Secretary has subpoenaed insurance contracts and plan records that have sensitive medical information. HIPAA was enacted specifically to limit the dissemination of medical information. ERISA §504 is no longer inconsistent with HIPAA and other privacy protections erected by Congress and the Courts.

E. The interpretations of the statutes advanced by petitioner do not impair rightful federal inquiries

Petitioner respectfully submits that the construction of GLB advanced herein does not make ERISA §504 useless as a tool for investigation. ERISA §504 was enacted in 1974, before the Privacy Act, 12 U.S.C. §3401 et seq., took effect, and 25 years before GLB. Section 504 of ERISA pre-dates the recognition of the right to privacy. *See Whalen v. Roe*,

429 U.S. 589 (1977) (the constitutional right to privacy protects two types of privacy interests: (1) the individual interest in avoiding disclosure of personal matters, and (2) the interest in independence in making certain important decisions). The Constitution obviously supersedes even those statutes enacted in good faith. Congress often corrects prior errors in policy. In GLB, Congress changed the requirement of pre-enforcement proof of jurisdiction, a hotly debated but critical issue in the previous case law. An agency now has to prove its jurisdiction before burdening citizens with the huge expense of subpoena compliance. Judge Posner and the Seventh Circuit expressed this common sense position 11 years ago without relying on GLB. *Reich v Great Lakes Indian Fish and Wild Life Commission,* 4 F3d 490 (7th Cir. 1993).[4]

Moreover, Congress appears to have imposed on agencies a greater responsibility for due diligence in the pre-litigation context.[5] No longer will the conclusory declarations of a

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[4] The question of regulatory jurisdiction is properly addressed at the subpoena enforcement stage, if as here, it is ripe for determination. *Reich v Great Lakes Indian Fish and Wild Life Commission.* supra. As noted by Judge Posner of the Seventh Circuit Court of Appeals, "compliance with a subpoena is a burden and one that a person or institution can show is not subject to the regulatory regime in aid of which the subpoena was issued should not be required to bear."

[5] This point is most important. This case only involves "investigations" prior to a court proceeding. Nothing impairs DOL from doing a preliminary investigation under Rule 11, filing suit, requesting discovery under Rule 26, and dismissing the action if

low-level investigator be sufficient cause to invade the privacy of Americans. This seems quite enlightened and consistent with modern concepts of ordered liberty. *United States v. Powell,* 379 U.S. 48, 58 (1964) (the court must allow respondent to prove any abuse of the subpoena process at an "adversary hearing").

F. Irreparable harm will occur unless relief is granted

Since the District Court's initial imposition of fines and prior to the Stay issued by Judges Becker and Fisher, Petitioner paid over $20,000.00 in fines to the clerk of the district court. In addition to the prospect of more fines, incarceration is sought. The severity of the sanctions takes this matter out of the realm of civil contempt and has positioned it as matter with the criminal sanctions of the taking of liberty and property. If a Writ of Mandamus is not issued Petitioner will suffer irreparable harm.

Petitioner does not dispute that the District Court has the inherent power to act to compel compliance with its legitimate orders. The U.S. Supreme Court has noted that a Federal court's wide discretion as to whether to invoke its inherent powers is tempered by its rather limited discretion as to how it exercises them, and therefore careful, case-specific consideration is owed not only to the character of

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necessary. Given the legal fees DOL caused petitioner to expend, regular litigation would not have been cheaper. But at least a judge would control the process consistent with the Constitution, not the Secretary.

the sanctionable conduct, but also to the nature and purpose of the sanction. Generally, the harshest of sanctions based on inherent powers have been upheld only in situations involving bad faith, contumacy, or egregious misconduct. *Chambers v NASCO*, 501 U.S. 45-46, 111 S. Ct. 2123.

Regardless, there is a point where fines cross the line from civil to criminal. The Court of Appeals for the Seventh Circuit considered exactly that question in *U.S. v Johnson*, 327 F3d 554 (7th Cir. 2003). In Johnson, the district judge ordered a $7,000 sanction, although withholding a finding of contempt. The Circuit Court *sua sponte* raised the issue of the excessive sanctions, and treated the case in large part as if a civil contempt finding had issued. The Court noted:

> "...conduct that is merely questionable warrants a less severe sanction (no matter how "dimwitted" the offenders or how badly they "muck up the cases")." In its finding that Appellants were engaged in the unauthorized practice of law, the district court did not indicate that they acted in bad faith; nor do we discern any such indication. ...
>
> .... the imposition of punitive sanctions is inconsistent with a finding that they were not in contempt of court. This argument begs the central question of our inquiry into the purpose and nature of the sanctions: Are the monetary sanctions imposed here punitive in nature?

327 F.3d 554, 563. Since the sanction was punitive, the Court ordered a refund.

Petitioner submits that the sanctions here have gone far beyond a Court's legitimate exercise of inherent power or appropriate discretion. The punitive sanctions are criminal in nature and Petitioner has been or will be denied constitutional protection. The U.S. Supreme Court in *Hicks v Feiock*, 485 U.S. 624, 108 S. Ct. 1423 (1988) addressed the nature of civil and criminal penalties and constitutional protection in the context of contempt proceedings.

> "...This is particularly so in the codified laws of contempt, where the 'civil' and 'criminal' labels of the law have become increasingly blurred. Instead, the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford. Ifi it is for civil contempt the punishment is remedial and for the benefit of the Complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the Court..."
>
> "These distinctions lead up to the fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections of the Constitution...." (citations omitted)

108 S. Ct. 1423 at 1430.

Given the prior actions by Judge McLaughlin, including the large fines, the use of Marshals, and the threat of incarceration, the district court's punitive intent can be inferred. This, coupled with the stated purpose on the District Court's Rule to Show cause for the January 23, 2006 hearing, supports a determination that Petitioner will suffer a deprivation

of rights in the absence of remedy. Moreover, to permit the imposition of sanctions and a contempt citation where there is an absence of jurisdiction is wholly inappropriate.

There is no indication in the record that petitioner has acted contumaciously or in bad faith. However, petitioners suggest that this Court issue a mandate that the $20,000 already paid by petitioner has crossed the line from civil into a criminal penalty. After all, petitioner Koresko, who has paid the fines, is an individual simply fulfilling what he perceives is the law and his duty, and the issues are those of first impression in this Circuit.

G. DOL already has the information it sought from petitioner and is not proceeding in good faith

In the prior proceedings, Petitioner offered the requested documents to the DOL of Labor in a version with redacted names. This was refused by DOL who made it abundantly clear that they sought the identities of the REAL VEBA participants. It is this identifying information that Petitioner seeks to protect. However, that effort may be a moot point as is the need to "compel" this information from Petitioner. On January 16, 2005, Petitioner learned that DOL Agent Fred Siegert had contacted multiple participants in REAL VEBA. These individuals are clients of Mr. Koresko who had given specific instructions not to make any identity disclosure. Clearly DOL has obtained the information it sought from Koresko from another source.

It is submitted that if the DOL has obtained the previously subpoenaed information and continues to seek enforcement of an unnecessary subpoena. The punitive intent of DOL can

be clearly inferred. The intervention of this Court through a Writ of Mandamus is necessary to prevent the ongoing violation of petitioner's liberty and property interests.

H. The requested relief comports with traditional notions of equity

Under traditional criteria for injunctive relief, petitioner believes he has sufficiently demonstrated the potential for success on the claim. While it is difficult to calculate potential success in a matter that may be of first impression, basic, common-sense statutory interpretation indicates that DOL must meet certain pre-requisites before issuing subpoenas to a lawyer or others. Citizens have a right to privacy of their financial and medical information, as well as their reputations.

RELIEF REQUESTED

This Court should Order that:

1. The district court shall immediately cease further contempt proceedings seeking to incarcerate or fine John Koresko or other petitioners. The hearing scheduled for January 23, 2006 to consider incarceration or contempt of petitioner and Susan Russell of Community Trust Company should be enjoined.

2. The subpoena enforcement proceeding instituted by the Secretary was invalid under Gramm-Leach –Bliley Act and the Right to Financial Privacy Act. Those statutes require notice to various consumer parties which was not proven. Those statutes as well as the Administrative Procedure Act, demand that the administrative agency demonstrate

jurisdiction before proceeding. *Mead, supra.* The DOL did not sustain its burden of proving jurisdiction.

3. ERISA § 504 states that the Secretary is only entitled to subpoena "information that is reportable to the Secretary." The Secretary's own regulations provide that none of the parties are compelled to report to the Secretary any information. Thus, the Secretary's subpoena sought information to which it was not entitled and should not have been enforced.

4. The Secretary has changed its administrative procedures to reflect arguments raised by petitioner. Under the RFPA, petitioners were never compelled to surrender the information demanded by the Secretary. Petitioner is therefore purged of contempt.

5. The district court improperly imposed contempt punishments against John J. Koresko, V, Esquire and the other petitioners. In good faith, they complied with the law.

6. The order of contempt, issued in the District Court at 04-MC-0074 is stricken. The Clerk of the District Court should return forthwith all fines previously paid by Attorney Koresko. The Secretary is hereby ordered to repay petitioner all amounts awarded as attorney fees by the district court.

7. The Secretary of Labor is in contempt for continuing subpoena enforcement activities in violation of the stay issued August 15, 2005. Moreover, the Secretary has continued to oppress the petitioners and the courts by seeking punishment for information which it declined to take and which it obtained elsewhere. Pursuant to the court's inherent powers, 42 U.S.C. § 1927, Rule 11, F.R.C.P., and ERISA §502, this court finds the Secretary's positions in bad faith

and petitioner as the prevailing party. The Secretary is hereby ordered to pay petitioner's attorney fees and costs incurred to date in connection with the subpoena enforcement proceedings generally. The district court is ordered to hold a hearing forthwith to determine the amount of the fees and costs, and issue an order and judgment consistent with this Order.

8. In light of the findings above, and the failure of the attorneys for the Secretary to disclose relevant information to the courts in this case, this matter is to be referred to the disciplinary authorities for the states in which those attorneys practice, including the Supreme Court of Pennsylvania.

Wherefore, petitioner respectfully prays that a writ of mandamus or, in the alternative, a writ of prohibition, and appropriate legal and equitable decrees be issued; and for such other and further relief as the court may deem proper.

Respectfully submitted,

JOHN J. KORESKO, V, ESQUIRE

Dated: JANUARY 19, 2006

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELAINE L. CHAO	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN J. KORESKO, et al.	:	NO. 04-mc-74

ELAINE CHAO L. CHAO	:	
v.	:	
COMMUNITY TRUST	:	
COMPANY	:	NO. 05-mc-18

ORDER

AND NOW, this 5th day January 2006, IT IS HEREBY ORDERED that the show cause hearing currently scheduled for January 9, 2006, is postponed until January 23, 2006. The Respondents in both cases shall appeal before the Court on January 23,2006, at 9:30 A.M., in Courtroom 13-A, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania to show case as follows:

1. Community Trust Company ("CTC") shall appear to show cause why it should not be held in contempt for failing to comply with the Court's Orders of May 5, 2005, August 17, 2005, and September 26, 2005, and why Susan A. Russell should not be incarcerated.

2. Susan A. Russell, the members of CTC's Board of Directors, or CTC's decisionmakers shall appeal before the Court at the show cause hearing.

3. John Koresko shall appeal before the Court to show cause why he should not be incarcerated.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.

December 30, 2005

Via Electronic Filing

The Honorable Mary. A. McLaughlin
United States District Court
for the Eastern District of Pennsylvania
Room 3809
601 Market Street
Philadelphia, PA 19106

Re: *Chao v. Koresko, et al.; Misc. Civ. No. 01-mc-74*

Dear Judge McLaughlin:

Counsel for the Secretary respectfully requests that the Court schedule and hold a show cause hearing as to why John Koresko should not be incarcerated. On August 4, 2005, the Court issued an Order postponing the show cause hearing that was scheduled to take place on August 17, 2005. In the Order, the Court acknowledged that the hearing would be rescheduled at a later date.

Since August 2005, the Third Circuit Court of Appeals has heard argument and issued its decision regarding Respondents' appeals of the District Court's enforcement and contempt Orders in this matter. By Decision dated October 12, 2005, the Third Circuit Court of Appeals affirmed the Orders of the District Court. *Chao v. John J. Koresko, et al.*, 2005 WL 2521886 (3rd Cir. (Pa.)). Respondent subsequently petitioned for en banc rehearing, which Third Circuit denied by Order dated December 20, 2005. On December 28, 2005,

Third Circuit Court of Appeals issued a Mandated and returned this matter to the District Court (Docket No. 102).

In light of the foregoing, the Secretary respectfully requests that the show cause hearing be held as soon as possible.

Respectfully,

Catherine Oliver Murphy
Regional Solicitor

By: _____/s/_____

Donald K. Neely
Attorney

Cc: Virginia Miller, Esq. (via electronic filing)

DKN:RM

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ELAINE L. CHAO,	)	Civil Action
Petitioner,	)	2:04-MC-00074-MAM
	)	
v.	)	
	)	
JOHN J. KORESKO, V, et al.,	)	Philadelphia, PA
Respondents.	)	March 16, 2005

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MARY A. McLAUGHLIN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceeding recorded by electronic sound recording; transcript produced by transcription service.

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(Call to order of the Court at 11:12 a.m.)

THE COURT: All rise. Court is now in session, the Honorable Mary A. McLaughlin presiding.

THE COURT: Good morning, everyone. Please be seated.

MS. APPETTA: Good morning, Your Honor.

MS. ROLLER: Good morning, Your Honor.

MS. MILLER: Good morning, Your Honor.

THE COURT: All right. We are here this morning for a continuation of the hearing that we had earlier on the petitioner motion for civil contempt. The petitioner, of course, is the secretary of labor and respondents are John J. Koresko and others. Let me see who's here this morning. Ms. Appetta and Ms. Roller, good morning to both of you.

MS. APPETTA: Good morning, Your Honor.

MS. ROLLER: Good morning, Your Honor.

THE COURT: Nice to see you again. Ms. Miller and this is your client, Mr. Koresko?

MS. MILLER: Yes, Your Honor.

THE COURT: All right. Good morning to both of you. And this is Ms. Jean Bonney?

MS. BONNEY: Yes, Your Honor.

THE COURT: Good morning to you, ma'am.

MS. BONNEY: Good morning.

THE COURT: All right, counsel. I have received a variety of papers from both sides and I am happy to hear from you. Ms. Appetta, you may proceed, ma'am. It's your motion.

MS. APPETTA: Thank you, Your Honor. Your Honor, it's the secretary's position that Respondent John Koresko should be incarcerated for his failure to comply or cause the other respondents to comply with your order of January 10th, as well as the August 23rd order. And we would offer that this conduct is particularly egregious, in light of your verbal direction at the hearing on January 7th, in which you told them to get all of the documents ready, pending the 3rd Circuit's decision.

The 3rd Circuit denied their request for a stay on January 24th, no additional documents have been produced to this date. Your order also clearly stated that for each day they did not comply, that there would be, of course, a fine of $250 and the attorney's fees would be paid and none of those have been paid. So, obviously, those - - that contempt order has not done anything to incur compliance at this point and so the secretary is here to ask for incarceration of Mr. Koresko.

THE COURT: Ms. Appetta, you have mentioned in your papers and I think you, at some point, orally stated that one of the secretary's concerns with this delay is the statute of limitations issue. Could you talk to me about that, please, ma'am?

MS. APPETTA: Yes, Your Honor. Under the statute of

MS. APPETTA: I need to check on that.

THE COURT: I think your more compensatory damages, your legal fees would be paid to you, but I do think that it's a coercive fine, it's the Court's order that is, excuse me, being disobeyed, so it is a fine that would be paid into the Court. And as far as - - and you have not gotten any coercive fine money and no - - do not know that it's been submitted to anyone at this point.

MS. APPETTA: That is correct, Your Honor. At the outset, I have no notice of it being submitted to the Court.

THE COURT: All right. All right. All right. Well, let me ask you one other thing, Ms. Appetta, before I turn to Ms. Miller. The focus has been on Mr. Koresko and Koresko and Associates. What is the secretary seeking? Civil contempt against any other respondent or just - - I understand you are seeking civil contempt - - well, there's already been adjudged civil contempt, but in your mind, who is it who has the documents who is in violation of this order?

MS. APPETTA: Your Honor, Mr. Koresko, as the president and owner of Koresko and Associates is the individual that would be solely responsible for causing their production. And also, based on affidavits submitted by the respondents in this Court, Koresko and Associates clearly has documents. There's also reason to believe that Penn-Mont, Respondent Penn-Mont Administrative Services also has documents. At the very least, we would say those three respondents have documents but we would be - - therefore, and only Mr. Koresko, as an individual overseeing those, the respondents, would be incarcerated - -

THE COURT: Right.

MS. APPETTA: - - but we do believe all respondents would be in contempt.

THE COURT: But do you believe that a coercive fine as to each respondent is appropriate?

MS. APPETTA: Well, yes, actually.

THE COURT: Mm-hmm. All right. Ms. Miller, I'll hear from you, ma'am. First of all, let me be sure - - let me ask you right off, has any of your clients produced any documents since our last hearing?

MS. MILLR: No, Your Honor.

THE COURT: Okay.

MS. MILLER: But I would like to draw Your Honor back to the fact that, at the original outset of this negotiation, before it came in front of Your Honor - -

HE COURT: Mm-hmm.

MS. MILLER: - - we had produced one plan out of two and we had also produced trust documents and adoption documents. And actually, at the first hearing, we offered to produce redacted documents, without the, what we felt were the attorney/client privileged matters.

THE COURT: No, ma'am, I completely understand that. But you have to rememnber that when you're in a civil contempt proceeding, we're not here to negotiate or to talk about all the arguments that you've been giving to me, that I

listened carefully to over many, many hours and just - - and made my decision based on my view of the law.

And I know that you've appealed my order and absolutely you are entitled to do that, but we can't, at this point- - we're not going to go back, I don't think the law allows it in a contempt hearing, to discuss again, you know, what you negotiated about and what your arguments are as to the invalidity of the fact that I should not have issued the order that I did.

But in any event, go right ahead, ma'am. But I do understand all that, sure, I - -

MS. MILLER: Your Honor - -

THE COURT: - -remember that.

MS. MILLER: - - that argument wasn't to the underlying matter, that was actually to an argument I'm going to get to later on, which talks about substantial compliance and whom the secretary of labor is saying is already in contempt. And we actually have a question on that from the 7 January hearing, when we sat in front of Your Honor and Your Honor said that she was going to continue these hearings, but she would not hold anyone in contempt, barring further testimony, to find out who had the documents.

And because of that and you denied the original motion for civil contempt at that time, we didn't go into the other factors, the fines, you know, who actually had the documents and the other matters with that. And on the 10th of January Your Honor issued an order that was prospective in nature and there was a question to that and whether that was a final order holding the persons in contempt.

In fact, the DOL, in their motion for incarceration, takes the viewpoint in their paragraph 23 that you unambiguously ordered civil contempt and the payment of the fines. Due to that - - and then they followup letter of 8 February, where the DOL said your clients are in contempt and they ask for all these fines to be forwarded to the DOL. We then filed an appeal to the 3rd Circuit.

If Your Honor takes the position that every - - that we already adjudged in contempt and you have already compelled payment and in our arguments in the papers, we then say, this really divests - - we didn't file motions to stay, because I'm really, truthfully, I don't think the order is unambiguous that is already before - -

THE COURT: You didn't think that you understood that Mr. Koresko and Koresko Associates was supposed to produce documents within 24 hours of receipt of the notice of the denial by the court of appeals of your motion for rehearing and rehearing on Baum?

MS. MILLER: Your Honor, what I don't understand about that order is that it says all respondents. And going back to that, Your Honor, I will agree to - - that, you know, it looks prospective that if you're saying that we're in civil contempt, we're in civil contempt. But the thing that it says is that all respondents - -

THE COURT: It says, those respondents in possession of documents responsive to the subpoenas. So, I guess what you should be telling me is, who is or is not in posses-

sion of documents responsive. If you have an argument that one of the respondents isn't, I think this is the time to do it, Ms. Miller.

MS. MILLER: Your Honor and I am actually just getting to that. It has been our position that the only person in custody of any documents is Koresko and Associates, the laws firm.

THE COURT: Okay. Do you have an affidavit to that effect? Do you have witnesses? What do we have? Have we had affidavits in the past to - -

MS. MILLER: Yes, Your Honor.

THE COURT: - - that effect? I need evidence as to who does not have documents.

MS. MILLER: Yes, Your Honor. And it's even mentioned in the DOL's papers that the evidence that Koresko - - John Koresko did an affidavit that the only possessor of the documents in this case, out of the people subpoenaed and the way that the subpoenas are related, is Koresko and Associates. I actually have two witnesses today here, if you need to hear that again. I have Ms. Jean Bonney and I have Mr. John Koresko.

THE COURT: I think we will need - - this is a very serious motion. I've got marshals in the courtroom and a court security officer. I mean, this is at the end now. You know, the time is sort of up. So, if you've got witnesses, you've got evidence with respect to why Mr. Koresko should not be incarcerated, then I think this is the time for you to

present them. So, go right ahead, ma'am. You may present any witnesses you care to.

MS. MILLER: I'm going to do my witnesses in just a moment. But I want to go back to something that Your Honor just said, that Your Honor is - - this is a very serious motion. We're talking about incarcerating someone today. We're talking about taking away their liberty, by the government, and they're bringing this motion without talking to us and they're actually - - this case - - there's no case on point that I could find where an administrative subpoena, where someone is supposedly in custody of documents, has been incarcerated.

I found cases, and I'm sure Your Honor is aware of those cases, where you have a grand jury and someone who is refusing to testify or you're having another live trial and someone is refusing to testify. There are no cases on point and I think that the reason is, is because I think this goes beyond the pail of just trying to start to incarcerate someone when the issue - - the underlying matters are on appeal.

And the first step that the government took here, and they're saying that they have no other way to get these documents, but I have the attorney from Community Trust Company in this room and I said from the beginning that the proper person to ask for these documents, rather than going to the person's attorney, was to go to Community Trust Company, which is actually the possessor and custodian of all these types of records as the trustee of this trust.

And this trust - - and I'll get to the testimony from my witnesses here. The plan administrator is not the holder of the documents, the trustee is. When we had that first

hearing, I told the DOL the person that has the documents is Community Trust Company. Let's go to the right person and not try to get privileged attorney/client documents. And Your Honor has that case in front of her now and I would say that the interests and - - you - - the United Mine Workers.

The supreme court talked about the interests that this Court musk look at when they are looking civil contempt and I would say that the interests and as laid out in our briefs to this Court are very compelling. You have what - - in the Upjohn case the U.S. Supreme Court called as one of the most sacred relationships, the attorney/client relationship and I have documents, affidavits that I provided for - - to Your Honor.

I actually will provide those in camera with the person's identity, that they see an attorney/client relationship here and they are compelling Mr. Koresko not to provide those documents.

THE COURT: You see, all those arguments are going to the subpoena, ma'am. We've heard them, I've ruled. I really think, ma'am, that if you have evidence that you want to put on, now is the time. So, if you would like to present witnesses, feel free. Please. I'm happy to hear them. I will be happy to hear that they don't have documents.

MS. MILLER: Your Honor, I would like to first - - my first witness I would like to call is Jean Bonney.

THE COURT: All right. Come right up, ma'am, if you would, to the witness stand over here to my leftand you'll be sworn in.

THE CLERK: Please raise your right hand.

JEAN BONNEY, RESPONDENTS' WITNESS, SWORN

THE CLERK: Please be seated. If you can state your name and spell your name and spell your last for the record.

THE WITNESS: Jean Bonney, B-O-N-N-E-Y.

THE CLERK: Please be seated.

THE COURT: You may proceed, Ms. Miller.

DIRECT EXAMINATION

BY MS.MILLER:

Q Ms. Bonney, are you familiar with the facts of this case?

A Yes, I am.

Q Have you submitted affidavits in this case?

A Yes, I have.

Q You have listened to the argument today, is that correct?

A Yes, I have.

Q You have listened to the argument today, is that correct?

A Yes, I have.

Q Who are the possessor the documents that are the respondents' here today?

A I believe Community Trust Company and, to the extent there's attorney/relationships, the law firm.

MS. APPETTA: Objection. CT – Community Trust Company is not a respondent in this matter.

THE COURT: All right

MS. APPETTA: The question posed is - -

THE COURT: But the question is, the documents that are responsive to this subpoena, there are various respondents, none of whom is Community Trust, but the respondents - - first of all, are you in a position to know whether any of these respondents have files? You need to lay a foundation as to who this witness is - -

MS. MILLER: Okay.

THE COURT: - - and whether she's in a position to know who has documents and who doesn't. I don't know who she is at this point.

MS. MILLER: Okay.

BY MS. MILLER:

Q Ms. Bonney, please describe your relationship with the respondents in this matter.

A I am an attorney for Koresko and Associates and I have been involved in giving tax and other financial advice to clients that come into the firm, seeking an income tax planning situation for their business and personally.

THE COURT: So, you are an attorney? And you - -

THE WITNESS: And Koresko and - -

THE COURT: And you work with Koresko and Associates.

THE WITNESS: Yes, ma'am.

THE COURT: All right. And you give legal advice to these respondents

THE WITNESS: Yes, ma'am, I do.

THE COURT: All right. Go Ahead

BY MS. MILLER:

Q How long have you been involved with the attorney/client relationship with the respondents?

A Since their - - since 1994, myself, personally, which I believe is 19 - - days particular arrangements were initiated in 1992.

Q Are you familiar with the Delaware Valley Leagues?

A Yes, I am.

Q What is the Delaware Valley Leagues?

A It's an informal, unincorporated association of employers that come together to provide benefits for their employees. I should say was. It's been defunct, I think, since 1996 or 7.

Q Does Delaware Valley Leagues possess any documents responsive to this subpoena?

A No, it does not. To my knowledge, no. It doesn't exist.

THE COURT: But that's the whole point, to your knowledge, ma'am. You need to let us know why you are the person to know. In other words, somebody can come in and tell me things, but they wouldn't have any basis to know it. So, why is it that you think that they don't have documents? I mean, you've said that they have disbanded or whatever the right word is, so that may be the reason. But do you understand what I'm saying? You need to explain to me a little more, how do you know that?

THE WITNESS: Basically, a new trust arrangement was created and the Delaware Valley Leagues ceased to exist. There was no trust anymore, there was no trustee anymore and there was only one member of it, a particular group called City Charles Markets was the sole remaining member of the Delaware Valley Leagues, so it wasn't Leagues, it was an - - one employer.

THE COURT: When it disbanded, what happened to its documents?

THE WITNESS: There really- - because it's a loose association of employers, there's nothing specific to that league and it actually says Delaware Valley League on it. There is no, let's say, magnet of or residual of - - a place for those documents to reside. It was just a way of explaining a

relationship, it was not an entity or an office or even a shoe box of documents. There's nothing there.

THE COURT: All right. Go ahead, ma'am.

BY MS. MILLER:

Q Going on to the REAL, what we call - - you're familiar with REAL?

A Yes, I am.

Q What is REAL?

A The Regional Employers Assurance Leagues, which I believe arose in 1999. Again, it's a loose - - may I go on or - - it's a loose informal group of employers it doesn't have a real separate entity existence. Again, there's not even a shoe box of documents, over a shred of documents that says REAL, because it's just a way of explaining a group of employers coming together to form a relationship so that they can have a trust that provides benefits for their employees.

Q You've reviewed the subpoenas in this case.

A Yes, I have.

Q Does REAL possess any of the documents directed for production in this case?

A No, because there is no REAL to direct it at. There is no entity REAL, it's a way of explaining a relationship.

Q Are you familiar with Penn-Mont Benefit Services?

A Yes, I am. I service- - they are one of my clients.

Q How long have you been involved with Penn-Mont Benefit Services?

A November of 1994

Q You have reviewed the subpoena directed against Penn-Mont in this case.

A Yes, I have.

Q Does Penn-Mont possess any of the documents compelled by the DOL?

A To the best of my knowledge, not having it in front of me, the one set or area of concern that was responsive was Penn-Mont's corporate documents, which I participated in a meet and confer, I assume it's the name for it, when we met -- during the day, we had a hearing in here and I believe it was in June and I stated that I believed that there were corporate documents of existence, and I brought them with me today, not knowing whether that would be helpful. But, there is- - that's - - to the extent that Penn-Mont doesn't have an employees, it has no assets, but it does have a corporate existence.

THE COURT: All right. Ms. Miller, are you prepared to produce Penn-Mont documents responsive to this subpoena today?

MS. MILLER: Your Honor, as we go through the testimony and I think what Ms. Bonney is just getting to, the only thing that Penn-Mont has is its corporate- -

THE WITNESS: Existence.

MS. MILLER: - - existence. It's - - when it's actually filed its corporate charter, which was prior to 1999. We are willing to produce it, even though it's outside the subpoena. The subpoena is asking- -

THE COURT: All right. Well then, you'll have - -

MS. MILLER: - - for documents- -

THE COURT: - - to talk a little bit more about the documents that Penn-Mont has and - -

MS. MILLER: Yes.

THE COURT: - - that's - - and then, Ms. Appetta and - - you know, you can obviously cross-examine here. But I thought Penn-Mont - - tell me who Penn-Mont is.

THE WITNESS: It's a corporate - - basically, it's an identity to - - it's a marketing organization to explain a certain set of benefits, but it has no employees and no separate - -

THE COURT: It's a corporation.

THE WITNESS: It is a corporation.

THE COURT: What is its function?

THE WITNESS: It's primarily a marketing organization elicit the further testimony if we need it, but those - - we believe those documents are outside the time period, but because we think they would be responsive we are more than willing to produce.

THE COURT: Ma'am, see your're saying things that are - -if something is responsive, it's responsive. If it's out

side the time frame requested, then it's not responsive. But I don't want to get into at this point what is or isn't responsive.

MS. MILLER: Okay.

THE COURT: You have an obligation, under my order, to give over responsive documents held by these various respondents. All right? So, I don't know what that means to say - -

MS. MILLER: Okay.

THE WITNESS: Your Honor- -

THE COURT: - - it's beyond the time.

MS. MILLER: Yeah.

THE WITNESS: May I respond

THE COURT: Ma'am, don't - -

MS. MILLER: All right.

THE WITNESS: Oh, sorry.

THE COURT: - - everybody- -

MS. MILLER: I'm going- -

THE COURT: - - slow down. When the judge speaks, nobody else talks. Go ahead, Ms. Miller, ask your next question.

BY MS. MILLER:

Q Regarding the documents that you brought today, directed from Penn-Mont, when are those documents dated?

A I believe they are dated in 1993 and 4. But to the extent I believe they were responsive, it's because they have a continuous existence and to the extent they reflect a continuous existence past and entering into the time period in question, which is the year 2000 and beyond, I believe that it was the most responsive set of documents that Penn-Mont could provide to show its corporate existence, which is all it is is corporate entity.

Q We've covered three out of the five respondents. The next respondent is Koresko and Associates, P.C. Does Koresko and Associates, P.C. possess documents that are responsive to the administrative subpoena in this case?

A I believe they do, yes. Or - -

Q Has Koresko and Associates, P.C. made any offers to the DOL regarding the production of these documents?

A My understanding is that all of the documents that Koresko and Associates, P.C. has were offered, but for the names, the identity of the individuals appearing in those documents.

Q Have you reviewed the DOL's submission to the 3rd Circuit in this case? Regarding the underlying appeal.

A I believe I have.

Q What does the DOL say about the possession of the identities in this case?

THE COURT: Ma'am, if there's a document from the 3rd Circuit, you can just give it to me. We are not going to be - -

MS. MILLER: Okay.

THE COURT: - -asking a witness to tell me what a document in the 3rd Circuit says. We're not going to do that.

MS. MILLER: Okay.

THE COURT: I can look at the document myself. And Ms. Miller, let me just- - if we can just cut though some of this. During this process, I spent many, many hours reviewing a big, thick black binder that you told me were samples of documents that you believed were privileged. Who has possession, custody and control of all of those documents that you gave me samples of?

MS. MILLER: That would be- - and Jean Bonney, who is sitting here, did the privilege log. That would be Koresko and Associates, P.C.

THE COURT: All right. So, all of those documents that are responsive are with Koresko and Associates, correct?

THE COURT: All right.

BY MS. MILLER:

Q Are you familiar with Community Trust Company?

A Yes, I am.

Q Who is Community Trust Company?

A They are a state chartered, private trustee that's located in Pennsylvania. They serve as trustee to the REAL/DVL arrangement.

Q Does Community Trust Company possess documents that would be responsive to the subpoenas in this case?

MS. APPETTA: Objection, Your Honor.

THE COURT: Sustained.

MS. APPETTA: Speculative.

THE COURT: Sustained.

(Pause)

MS. MILLER: If, Your Honor, if I could just have one minute?

THE COURT: Sure. Go right ahead.

(Pause)

BY MS. MILLER:

Q What is Koresko and Associates, P.C.'s relationship to the participants, the beneficiary and employers involved in these - - in REAL and DVL?

A They represent those individuals as tax law firm.

Q Have you been contacted by any of these participants, beneficiaries and/or employers regarding this action?

A Yes, I have.

Q What was the contact with these participants- -

MS. APPETTA: Objection. Calls for hearsay. You can tell by the question, Your Honor.

THE COURT: Well, I'm going to sustain the objection. I am not sure what the - - what's the relevance of this? I mean, I have already been presented with arguments about attorney/client privilege and sustained, to a limited extent, and overruled a lot of them. So, I - - the Court has, at this point, issued an order so that the attorneys, if they give something over, are protected. Because they're producing documents responsive to a Court order.

So, ma'am, I don't really understand the relevance of what these people may or may not have said. It is hearsay, but what is the relevance of it? Putting aside the hearsay problem.

MS. MILLER: The participants and the beneficiaries and the employers in this case, as I have provided the redacted version of the declaration, I actually have, as I said, I will present the, for in camera use only, the signed - -

THE COURT: But what's the relevance of- -

MS. MILLER: The relevance in this case is that the participants and beneficiaries are objecting for their personal privacy rights, that this violates the federal statutes. And a matter of first impression, Gram-Leach-Bliley and a case that's not a case of first impression, is the Right to Financial Privacy Act.

THE COURT: All right. But see, you're making arguments that really-it's over. In other words, we had all privilege, everything. I listened to every argument you made.

So, at this point, we have an order of the Court that- - gee, at this point, I think I issued it back in August, did I not, and I gave you months and months and months, every appeal you wanted to take on it, I stayed my order pending it. But, you see, at this point, this is a contempt proceeding and we're not going to go over again all of your arguments, it's just not appropriate for a civil contempt proceeding.

At this point, the Court's order has got to be respected or else I have to issue civil contempt. We don't have much choice on it, ma'am, so I don't see the relevance of what you were going at, so I will continue to sustain that objection. Go ahead.

MS. MILLER: Your Honor we agree that - - and from the testimony here that Koresko and Associates, P.C. is in possession of certain of these documents and from Your Honor's discussion that they are in- -

THE COURT: Okay. Do you have any other questions for this witness, before I turn her over to Ms. Appetta for questioning?

MS. MILLER: No.

THE COURT: All right. Ms. Appetta, did you - - go ahead. Take your time.

MS. APPETTA: Can I just - - I have one question.

THE COURT: Sure.

(Pause)

CROSS-EXAMINATION

BY MS. APPETTA:

Q Ms. Bonney, you've stated that you - - that Koresko and Associates does have documents responsive to the subpoena, is that correct?

A As I understand it, yes.

Q And you've also indicated that Penn-Mont Benefit Services does not have any documents responsive to the casino - - excuse me, to the subpoenas, with the exception of this one group prior to 2000, is that correct?

A One group of documents?

Q One group of documents, excuse me.

A As far as subject matter, Penn-Mont has no existence and has no independent identities. So, to the extent that it only exists as a corporation, that's the only thing it could respond to. So, that would be my answer, is that this - - that's it.

Q And you are familiar with the subpoena that was issued to Penn-Mont Benefit Services?

A I've read it.

Q And you're familiar that, although it asks for documents

From 2000, it also asks for any documents used or relied upon prior to January 1st of 2000, is that correct?

A That may be why it came to mind to come up with the corporate existence documents.

Q So, those corporate existence documents would be relevant to the subpoena, is that correct?

THE COURT: I think responsive is the word.

THE WITNESS: Yeah, re - -

MS. APPETTA: Responsive, excuse me. Yes, Your Honor.

THE WITNESS: They would be responsive. When we met in our meet and confer, I suggested that that would be what would be produced.

BY MS. APPETTA:

Q Okay. And Penn-Mont Benefit Services doesn't have an offices?

A It doesn't have an employee. So, to the extent - -

Q Okay.

A - - you have an office that has people working for that entity, it doesn't, because there's no Penn-Mont employees.

Q It doesn't have any - - so, it doesn't have any staff:

A There is no employee of Penn-Mont Benefit Services.

THE COURT: Does it have a staff, though?

MS. APPETTA: Does it have a staff, attorneys - -

THE COURT: Whether they're employees or not.

MS. APPETTA: - - advisors - -

THE WITNESS: I don't - - I really don't know what you mean. You have to - -

BY MS. APPETTA:

Q I just asked - -

A It just - - it has no employees, so I don't know what you mean by staff.

Q Does it have any - - does Penn-Mont Benefit Services have any advisors

A I serve as counsel to that entity, as a corporate existence, but it doesn't have - -

THE COURT: Ms. - - is there - - are there any officers of Penn-Mont Benefit Services?

THE WITNESS: I believe there are officers.

THE COURT: Okay. Who are - -

THE WITNESS: But I know - -

THE COURT: - - the officers?

THE WITNESS: I would prefer to refer to the - - I'd prefer to look at the corporate documents to give that to you. I'm not one of them, so I'm not - -

THE COURT: Well, when you say you'd prefer, if you don't know, just - - please, just say you don't know.

THE WITNESS: I'd rather not guess. I could - -

THE COURT: Well, no, we don't want you to guess.

THE WITNESS: Okay.

THE COURT: So, if you don't know, that's fine.

THE WITNESS: I'm not an officer myself, so I don't know who serves in that - -

THE COURT: Is there a location? In other words, on the corporate documents that you say you brought with you, is there a location where this exists?

THE WITNESS: To the extent that there are legal documents that come in for Penn-Mont Benefit Services, they are sent to the law – they are sent to the attention of the law firm.

THE COURT: So, the law firm has Penn-Mont Benefit Services' documents?

THE WITNESS: They have documents that are concerning the existence of Penn-Mont Benefit Services and they are a client of the firm, as an entity. So, Penn - - the law firm would have documents that would be addressed to Penn-Mont Benefit Services, let's say.

BY MS. APPETTA:

Q Okay. So, Koresko and Associates should have documents, then, that are responsive to the subpoena on behalf of Penn-Mont Benefit Services is that correct?

A Let's say there were five topics and you said, give us the corporate existence documents for Penn-Mont. That

would be a category in which there were - - you could be responsive. And if the other four questions asked for employees - - hypothetically, employees or what they had for lunch or - - since that doesn't exist, there are no responsive documents, because the response is there - - there's nothing responsive to the question.

MS. APPETTA: Your Honor, may I approach?

THE COURT: Of course.

MS. APPETTA: I apologize, I only have one - -

THE COURT: That's all right. Don't worry about it. But just show it to Ms. Miller ahead of time.

(Pause)

THE COURT: Sure, go right ahead. You my approach. That's all right, you don't need to show it to me, unless I need it later. But what you need to do, though, is mark it, ma'am. You want to just call it Petitioner's 1? You can just do it with your pen, that will be fine. And then you can, if you decide to admit it into evidence, just give it to me.

(Pause)

BY MS. APPETTA:

Q Ms. Bonney, I have placed before you what has just been marked as Petitioner's Exhibit 1. Have you ever seen this document?

A Well, it's - -

Q Or an image of this - -

A No.

Q Have you ever seen an image of this document, electronically?

A This appears to be a web page.

Q Are you familiar with the Penn-Mont Administrative Services web site?

A I've seen it.

Q Okay. Are you familiar with the contents of the web site?

A Some of it I've read, yes.

Q Have you - - and are you familiar with representations made at the web site?

A I have not read every single word on that web site, if that's what you're asking

Q Okay. And what does the document in front of you appear to - - actually, strike that.

MS. MILLER: Objection.

MS. APPETTA: The - -

THE COURT: Well, wait until the lawyer makes the question then you can object. Go ahead, ma'am. Until she asks the question.

BY MS. APPETTA:

Q And the - - what is the image in front of you? What is the copy of that document from the web site? What does that appear to be?

A A home page

Q Okay.

THE COURT: Who is in charge of the home - - or the web site for the Penn-Mont Services? Do you know?

THE WITNESS: No, I don't.

THE COURT: All right.

THE WITNESS: This appears - - I'm sorry. Excuse me.

BY MS. APPETTA:

Q No, go ahead. It appears to be?

A A marketing.

Q And the subpoena asked for marketing documents, is that correct? From Penn-Mont Benefit Services.

A Well, if I - - may I respond? Again, in the meet and confer, we discussed that. I brought what our marketing materials, but I wasn't sure - - because there's no - - I don't know who would be producing them, but I brought marketing materials, that we discussed in that meeting as things that were available.

MS. APPETTA: All right. Your Honor, may I approach?

THE COURT: Sure.

MS. APPETTA: This is the same one I showed you before.

MS. MILLER: Yes.

(Pause)

BY MS. APPETTA:

Q Ms. Bonney, I have just presented to you what's been marked as Petitioner's Exhibit 2. Do you recognize the image or the contents of the documents I have put before you?

A I mean, I could read them. I understand what they say.

Q Are you familiar with them at all?

A I haven't read this before.

Q Are you - - yet, you've testified that Penn-Mont Benefit Services is a client of Koresko and Associates?

A I don't - - yeah, of course.

Q All right. And you've worked with them?

A I am counsel to Penn-Mont Benefit Services.

Q Okay. And you've also testified they don't have a staff or employees, is that correct?

A There is no payroll which contains Penn-Mont as the employer and - -

Q Could you read - - okay. Could you please look at the first paragraph under that, it says advisors. It says:

"Penn-Mont Benefit Services, P.M. is a certified benefits administrator and educator comprised of attorneys, accountants and financial professionals. We provide plan design, proposal generation, plan documents and plan administration in numerous venues."

That doesn't sound like a corporate entity to me, just a corporate entity.

THE COURT: But you need to ask a question.

BY MS. APPETTA:

Q Does that to you? Yes or no?

A Does it sound like a corporate entity?

Q Mm-hmm.

A It sounds like a marketing organization that calls itself Penn-Mont Benefit Services, that relies on persons employed by other entities to join in them - - in their marketing services. That's what it sounds like.

Q And there is a list down below, plan administrators listed. Do you see that? It says Penn-Mont Benefit Services, Inc.

A Right.

Q Okay. The address: 200 West 4th Street

A That's the law firm.

Q That's the same address as Koresko and Associates, is that correct?

A That's correct.

Q And if you turn the page, please? You see it says section four, compensation and fees. And it says: "Compensation: Penn-Mont/Agent." Do you see where I'm at?

A Yes, I do.

Q It says: "You engage Penn-Mont for the value of services set out below with the agreement and understanding that you will split any commissions earned on concepts presented to you by Penn-Mont, based on the following services schedule. Agent is also bound to use Penn-Mont as the third plan administrator."

And then, it goes on to give a fee arrangement. Do you see that?

A Right.

Q Okay. So, is it still your testimony that Penn-Mont Benefit Services doesn't have a stock, doesn't have any type of income?

A I - - you didn't ask me that question, you asked me if they have a staff.

Q But you've testified that they don't generate or do any type of business, they just simply provide marketing services.

A I - -

MS. MILLER: Objection

THE COURT: I'll sustain the objection. Rephrase your question, Ms. Appetta.

BY MS. APPETTA:

Q You've been testifying today that they simply have a corporate existence and that everything is through Koresko and Associates, is that correct?

A No, I said they - - that are only corporate - - they only are a corporate entity, there is no employees of Penn-Mont Benefit Services.

Q Okay. Yet, based on this web sit information, you would agree that it at least holds out that Penn-Mont has some employees?

A No, it doesn't say they have a staff.

MS. MILLER: Objection

THE COURT: Well, let met just cut through it if I may. Ma'am, see, you've come and you've said you know about Penn-Mont, because you are counsel to them, and they don't have any documents except for these limited corporate documents.

That's what you've said.

THE WITNESS: Right.

THE COURT: Now, apparently, and I don't know, because I haven't even seen it yet, but there is a web site. Is this all from the web site?

MS. APPETTA: Yes, it is, Your Honor.

THE COURT: All right. There is this web site that talks about what Penn-Mont does and all of these people. So, what Ms. Appetta is trying to get at is, are all these people employees of Koresko and Associates?

THE WITNESS: Yes, they are.

THE COURT: Every single person? So, that the - -

THE WITNESS: Absolutely.

THE COURT: - - accountants, the lawyers, the this, the that, they are all employees of Koresko and Associates?

THE WITNESS: Yes.

THE COURT: Okay. So every document that Penn-Mont has should be in the possession of Koresko and Associates. There's no other accounting firm or any other firm?

THE WITNESS: I can't say that 100 percent, the - - Penn-Mont may, as an entity, have outside advisors. I may not even know about it, so don't hold me to - - but to my best of my knowledge, Koresko and Associates is the law firm for Penn-Mont and is the possessor of whatever documents you might want to attribute to the entity Penn-Mont Benefit Services. Because Penn-Mont itself has no employees and no assets. It looks, that I know of it, it's a marketing organization. It's like a D.B.A, in a sense.

THE COURT: Okay. Well - -

THE WITNESS: Although it has a separate corporate - -

THE COURT: Now, ma'am, have you brought the materials, at least with respect to the web site with you?

THE WITNESS: I brought - - well, again, I thought I was talking about a specific period of time, the year 2000 or so. So, I have what was then the marketing materials that had Penn-Mont's name on it, to the extent that Penn-Mont is a marketing group, I have brought them with me. Because again, in our meet an confer, you remember - -

THE COURT: Ma'am, the meet and confer is long ago.

THE WITNESS: I understand, but I - -

THE COURT: We are way beyond - -

THE WITNESS: - - am trying - - so that they - -

THE COURT: Ma'am, slow down.

THE WITNESS: - - have a frame of reference.

THE COURT: Slow down.

THE WITNESS: Okay.

THE COURT: The meet and confer was long ago, it's over. You had the chance to meet and confer and you weren't all able to negotiate, so I had to spend hours on this and that's why we're here today. Ms. Appetta, is the web-

site materials that you've given, is that responsive to the subpoena?

MS. APPETTA: It - - yes, actually it would be responsive to this subpoena. But more importantly, it leads, I would believe that Penn-Mont Benefit Services, if they themselves do not have documents, that somebody certainly should have documents that were requested by this subpoena that cover Penn-Mont Benefit Services.

THE COURT: Mm-hmm. All right. Well, I think what we're hearing though is - -

MS. APPETTA: So, that was the point.

THE COURT: - - Koresko and Associates has the documents

MS. APPETTA: Yes.

THE COURT: Is that right, ma'am?

THE WITNESS: Yes.

THE COURT: Okay. Koresko and Associates has them.

MS. APPETTA: All right.

THE COURT: All right?

MS. APPETTA: If I could just have one moment?

THE COURT: Sure.

(Pause)

MS. APPETTA: Just very brief.

THE COURT: Ma'am, take as much time - -

MS. APPETTA: Okay.

THE COURT: - - as you need. Same for Ms. Miller, as much time as everybody needs or wants.

MS. MILLER: Okay.

BY MS. APPETTA:

Q Ms. Bonney, isn't it correct that checks and other documents then are routinely sent to Penn-Mont Benefit Services, care of Koresko and Associates?

A You asked me a double negative. Isn't it correct that they - -

Q Well, if Penn-Mont exists - - basically - - if it's Koresko that is - - that has all of the documents, are documents that are sent to Penn-Mont, they are not sent directly to Penn-Mont Administrative Services, is that correct?

A I - - we have a physical - -

MS. MILLER: Objection.

THE COURT: I'll sustain it, because I think it's a little confusing.

MS. APPETTA: Okay.

THE COURT: Why don't you just back up for a minute and rephrase the question - -

MS. APPETTA: All right.

THE COURT: - - Ms. Appetta. I know what you're getting at, but I think you need to state it a little more clearly.

MS. APPETTA: I'll break it up.

BY MS. APPETTA:

Q Would you agree that checks and other documents are routinely sent to Penn-Mont Benefit Services?

A Yes.

Q Okay. And then those checks and other documents goes straight to Koresko and Associates? Is that correct?

A They're man - - they're handled by law firm - - they are handled by the lawyers and mem - - and employees of the law firm.

Q So, you receive a document addressed to Penn-Mont Benefit Services, but you open it on behalf of Koresko and Associates? Is that correct?

A Are you asking me personally or - -

Q Yes, as an example, if this is how it's handled in your office. You've testified that you work for Koresko and Associates, you've testified that you work for Koresko and Associates, you've testified that Penn-Mont is your client.

A Would I open a document addressed to Penn-Mont Benefit Services? Yes, I would.

Q Okay. So then, Koresko and Associates would have all correspondence, all checks, all documents relating to Penn-Mont Benefit Services?

A To be honest, I am not the owner and I have no equity position. I can tell you that if documents come to the law firm addressed to Penn-Mont, because they are a law firm client, they would be opened by a law firm employee if they came to that address. If there are other addresses or other places that Penn-Mont related documents would go, in all honesty I don't know.

Q I am talking about the documents that are sent to the address of Penn-Mont Benefit Services, which is also the same as the address for Koresko and Associates.

A Yes, that - - yes, that would be accurate.

MS. APPETTA: Okay. I don't have anything further, Your Honor.

THE COURT: All right. Just one thing. What is Mr. John J. Koresko's position with Koresko and Associates?

THE WITNESS: He is the owner of Koresko and Associates.

THE COURT: Okay. Ms. Miller, any redirect?

MS. MILLER: Yes, Your Honor. I have a couple questions.

(Side comments off the record)

MS. MILLER: Yes, they are up there.

REDIRECT EXAMINATION

BY MS. MILLER:

Q I want to go back to the testimony that we just had on the checks. Do you remember the question that Ms. Appetta asked you about checks received by - - sent to Penn-Mont?

A Yes, I do.

Q Do you remember any of the payees on those checks? Who they were made out to.

A Oh.

Q I'm sorry

A If it says - - oh. Okay. Penn-Mont might receive a - - an envelope might come in with Penn-Mont as the address, it would be made to a trust or a custodial trustee or - - that's why it's handled by the law firm, because these are very high profile documents, so to speak, they are not, say, you know, marketing or advertising unimportant documents, they're very important documents. Very often there will be adoption documents.

In other words, if Penn-Mont is acting as a marketing group and it markets an agent in the - - if the person that's helping someone in their financial planning wants their client to adopt a plan, the documents come to the law firm with Penn-Mont, so that it flags this is a Penn-Mont related issue. And so, it comes to a lawyer or an auditor. If it's a financial document, it goes to a what we would call an in-house banker type person who handles that type of very important documents.

It's not - - I'm trying to distinguish it betweer straight advertising stuff. So that if things are coming to the law firm with Penn-Mont on it, it's a legal or financia document, handled by a lawyer or an employee of the law firm.

Q Does Penn-Mont receive checks that are made out tc the various trust in this company - - this case?

A It would receive an envelope, perhaps, or the outside or the envelope might actually say the name of the bank or the name of the trustee or the name of the plan. People are somewhat haphazard, they are not - - it is my understanding, they are nor provided with preprinted envelopes. So, it might say Penn-Mont on the outside, but when it comes in it's going to actually have the name of a plan, as a contribution, or a bank, as the deposit receiving entity.

Q Regarding these trust checks you're testifying on, who are - - who do you forward these checks to?

A They get deposited into a trust account, which is maintained by Community Trust Company as the custod - - as the trustee.

Q Do you have the exhibits that you were given - -

A Yes, I do.

Q - - previously?

(Pause)

BY MS. MILLER:

Q You've reviewed the subpoenas.

A Yes.

Q What entities, what supposed ERISA entities are these subpoenas directed to?

A None. There are no ERISA entities - -

MS. APPETTA: Objection, Your Honor.

THE COURT: Sustained.

BY MS. MILLER:

Q What leagues or what association of employer or employee welfare benefit plans are these subpoenas directed to?

MS APPETTA: Objection, Your Honor.

THE COURT: I am going to sustain it. Ma'am, move on to another - - if you have another issue for redirect, feel free to do it, but I am going - -

MS. MILLER: Okay.

THE COURT: - - to sustain objections.

BY MS. MILLER:

Q Would you look at Exhibit Number 2?

A Okay.

Q The plans that are the subject of this subpoena, do they use variable 4-12 (I)?

A No, they do not.

Q Would you review that exhibit in front of you and would that be responsive to the subpoenas directed by the DOL in this case?

A No, it would not.

Q And why is that?

A This describes a defined benefit plan, which is - - my understanding is, the subpoenas are pursuant to a welfare benefit plan, not a pension plan. This is entirely in opposite to the subpoenas.

Q For the Court's edification, could you explain what a 4-12 (I) plan is?

MS. APPETTA: Objection, Your Honor

THE COURT: I am going to sustain it, because - -

MS. MILLER: I am sorry

THE COURT: - - we are way beyond that, ma'am.

MS. MILLER: Okay.

THE COURT: We are beyond it, really.

(Pause)

MS. MILLER: I think that's it.

THE COURT: All right. Anything further for Ms. Bonney?

MS. APPETTA: Your Honor, at this time, the petitioner would like to move exhibits 1 and 2 into evidence.

THE COURT: All right. Is there an objection?

MS. MILLER: No, Your Honor.

THE COURT: All right. They will be admitted and you may step down, Ms. Bonney.

THE WITNESS: Okay.

THE COURT: Thank you very much.

(End of testimony)

THE COURT: And Ms. Miller, you may call your next witness.

(Pause)

MS. MILLER: Your Honor, we - - we're going - - we're not going to call any further witnesses.

THE COURT: All right. Anything further, Ms. Appetta, from you? From your side?

MS. APPETTA: Can I have one moment?

THE COURT: Of course.

(Pause)

MS. APPETTA: No, Your Honor.

THE COURT: All right. I'll hear any further argument. Ms. Appetta, do you want to make any further argument at this point?

MS. APPETTA: Yes, Your Honor. I - -

THE COURT: Sure.

MS. APPETTA: - - would just like to reiterate, including, based on the testimony of Ms. Bonney, that there are certainly documents responsive to the subpoena that was issued to Penn-Mont Benefit Services. Whether or not they are in their custody or control or possession, there are documents responsive.

And again, I believe it's also been represented to this Court that Koresko, himself, is the president of Koresko

and Associates and he is also the sole shareholder of that company, as well. Therefore, he is not the individual that would have control over the production of all the documents.

THE COURT: All right.

MS. APPETTA: And again, we ask that the Court order compliance and his incarceration.

THE COURT: All right. Ms. Miller, I'll hear from you, ma'am. And I guess what I'd like to know is, I know that you called my chambers yesterday, or someone on your behalf, to say that you tried to file some check into the Court. From reading your papers that I got last night, it sounded as if it was your – it was a check for $15,000 for a bond? I didn't quite understand what you meant by that.

MS. MILLER: Your Honor, in this case, we were trying to post a bond or some type of a good faith obligation with the Court. And I called up the clerk of court yesterday, attempting to post a bond, $15,000 or more –

THE COURT: Mm-Hmm.

MS MILLER: -- and I was told that they would not take that money, that I would actually have to get an order or a phone call from Your Honor to allow that posting.

THE COURT: Mm-hmm.

MS. MILLER: So, we were more than willing to post an amount or write whatever check that Your Honor need in this case.

THE COURT: All right. But, see, I don't know what you say when you say need. There's currently an order that adjudged Koresko and Associates, at least, in civil contempt starting with, I'm going to give you January 26th, because the 3rd Circuit order came down January 24th, as I understand it. So, that's at $250 a day of a coercive fine. That's $12,250. Not bond. I mean, that's actual money paid in as coercive fine. Is that what you were trying to do?

MS. MILLER: Yes, Your Honor. And we were trying to do it prospectively , too, but that's why I was trying to—when I tried to call the clerk of courts to attempt to do this, they would not –

THE COURT: Mm-hmm.

MS MILLER: --they would not—

THE COURT: No I appreciate that.

MS. MILLER: - - accept.

THE COURT: No, I appreciate that. That is not your fault at all and it's clear that it didn't. But you see, what I'm having trouble with, it's not a bond, it's money paid in you're not going to get back. Do - -

MS. MILLER: Yes, Your Honor.

THE COURT: - - you understand that? So - -

MS. MILLER: Yes.

THE COURT: All right. So, you're saying - -

MS MILLER: But we weren't - - just for Your Honor - -

THE COURT: Yeah.

MS. MILLER: We weren't sure if you were posting money further out. Whether - - there was a question from the clerk of courts, is whether - - was that considered a bond or how - -

THE COURT: Right.

MS. MILLER: You know, a cash amount, how do we do that. We were attempting - -

THE COURT: Sure.

MS. MILLER: - - at that point to make some type of a - -

THE COURT: Right, I appreciate that and I will do a specific order for the clerk

MS. MILLER: Okay.

THE COURT: - - explaining that this is a coercive fine payment and then - - so, you are saying that your client will make the coercive fine payment.

MS. MILLER: Yes, Your Honor.

THE COURT: That's due at this point. And I'm going - - I mean, as I haven't heard anything to suggest that Koresko and associates and Penn-Mont are not in civil contempt, I mean, I don't even understand what the argument would be. So, my order stands and the $250 a day continues.

I'll hear you on the request for attorney's fees. If you - - I know you argued in your papers, but if you want to make any oral argument, I'm happy to hear it.

MS. MILLER: Yes, Your Honor. I would like to make an oral argument of this case.

Going back to United Mine Workers, where the U.S. Supreme Court talks about these types of fines. When it's compensatory, it has to compensate for actual losses resulting from the non-compliance. In this case, our - - we have several arguments on that. One that Your Honor denied those - - that motion, but also in this case, the 3rd Circuit has talked about how you submit attorney fees and what are proper in attorney fees. And Muldondo (phonetic) talks to that, which - -

THE COURT: Muldondo.

MS. MILLER: Yeah, I'm sorry, Your Honor.

THE COURT: That's all right.

MS. MILLER: I won't give you cites, since you are familiar with that. But it talks about that you have to do certain documentation. In this case, the documentation isn't there. There is no indication of what the 21 hours were spent doing, to see if there's any excessiveness. Because when I look at the renewed motion for adjudication of civil con-

tempt, it looked almost exactly like the first motion that was filed. And I would, you know, put forth to this Court that Ms. Appetta would probably say that is a canned motion that the DOL uses.

And I'd also would - - in this case, because United Mine Workers says it compensate for actual losses. The actual loss to the government is not $250 per hour for Ms. Appetta. She should have an hourly rate that she bills out at and she has not but that before this Court. And under the 3rd Circuit's guidance, I think that this is improper and the 3rd Circuit has said that it's on - - the burden is on the person requesting the attorney's fees, to put everything into the record. And this case, the record is not before this Court that's appropriate to award actual losses.

THE COURT: All right. Ms. Appetta, do you want to respond to that? And you'll be able to make more arguments too, I just want to take each topic.

MS. MILLER: Okay.

THE COURT: Go ahead, Ms. Appetta. On that one topic. Sure, take your time.

MS. APPETTA: May I have one moment?

THE COURT: Sure

(Pause)

MS. APPETTA: Your Honor, as to the appropriateness, I - - there is ample case law that attorney's fees are a reasonable sanction in a contempt proceeding and that was

the intent of our request at the last hearing. So, I would offer that that is more than reasonable and appropriate.

And as for the $250 rate that I offered as what my rate would be. There is case law that indicates that it's unfair to the government and public interests if we were to only be charge what our actual government hourly rate is, rather than using a market rate. And so, in this circumstance, we used a $250 market rate.

As for what the 21 hours comprises, I- - it is not simply just the preparation of the memo, it was also the time to prepare for this hearing, looking at the case laws, the briefs that Ms. Miller filed just prior to the hearing and preparing for the arguments, Your Honor.

THE COURT: All right. Anything further on that topic, Ms. Miller? And then I'll hear you on any other topic.

MS. MILLER: I would just redirect Your Honor to the 3rd Circuit case that we mentioned that says that I should be allowed to see what those hours were spent on. You know, what, you know, what was spent drafting, what was spent doing this, that, so we can - -

THE COURT: All right.

MS. MILLER: - - you know, say is there a learning curve involved in this, is there an excessiveness. And there's nothing - -

THE COURT: All right. Let me take a look.

MS. MILLER: - - in here to indicate even Ms. Appetta's, you know, where she graduated from - - Your Honor is familiar with what the - -

THE COURT: Yeah.

MS. MILLER: - - what the fees - -

THE COURT: All right. Ms. Appetta, let me take a look at it. Go through - - did you - - you did an affidavit. Now, did you do a time sheet for me? I thought you had. Did you not do a time sheet?

MS. APPETTA: I did not do a full time shee.

THE COURT: A break down of what - - how much time - -

MS. APPETTA: That - - although, I do not have it with me, that is what it is based on.

THE COURT: Okay. All right. Well, I do think it's a fair point and to be quite frank, I must have just thought I saw it. I thought I saw a breakdown. I do think Ms. Miller is entitled to a breakdown of it, but I do think that Ms. Appetta is correct with respect to government attorneys and how one goes about determining the appropriate hourly rate. But I do think Ms. Miller is entitled to a breakdown. So, if you would submit that as a supplemental part of your request, Ms. Appetta, and I will look at that.

Okay. Ms. Miller, excuse me, any other issues that you want to speak on?

MS. MILLER: Yes, Your Honor. I'd like to also visit the compensatory fines in this case. Or actually I think now Your Honor is - -

THE COURT: The coercive fine?

MS. MILLER: - - referred to the coercive fines.

THE COURT: I think it's always been a coercive fine, but - -

MS. MILLER: I'm sorry, Your Honor, I - -

THE COURT: - - be that as it may - -

MS. MILLER: Originally, I had it written down as compensatory - -

THE COURT: No, it's a coercive fine to - -

MS. MILLER: Yes.

THE COURT: - - try to coerce your client into giving the documents that I ordered to be given.

MS. MILLER: I would just, in this case, I would say that ERISA speaks to the public policy in this and has set forth fines for the failure to provide these documents. And I understand Your Honor is now ruling that - -

THE COURT: This is the hundred dollar issue?

MS. MILLER: Yes, Your Honor.

THE COURT: Yeah, I did see that. What is that about, Ms. Appetta? What's your position on this hundred

dollars? I haven't actually studied as yet and I will, bu what's your position?

MS. APPETTA: It's inapplicable to this case, be cause it's a civil penalty that the government would be seek ing in a complaint or an action where they asked for the documents. But in this case, the fine that's imposed is a co ercive fine for not complying with the Court's order and we would - - and again, there's ample case law on the fines, i could be even more than $250.

THE COURT: Of course, I could do $1,000 a day - -

MS. APPETTA: Yes.

THE COURT: - - which did cross my mind. All right. Well, just to be clear, because, Ms. Miller, you have said that you haven't by my earlier order on January 10th. But Koresko and Associates and Penn-Mont have been judged in civil contempt. They both have documents. Penn-Mont has some documents, even though most of them appear to be with Koresko and Associates.

Because of the relationship between Penn-Mont and Koresko and Associates, I will maintain my $250 per day coercive fine, which I did, when I gave it, it seems to me, I meant it to be one $250 fine and I don't think, having heard anything today, that there's any reason to change that, Ms. Appetta, because it seems to me that the only entities that have documents are Penn-Mont, through Koresko, and Koresko and Associates.

But, ma'am, each day that goes by, your Koresko and Associates and Penn-Mont, jointly, are liable for a coercive

of $250. Ma'am, what is your client's current position, so I know? I mean, what - - are you going to - - is your client going to continue not to give the documents over in compliance with my order?

MS. MILLER: Your Honor, may I have a moment to - -

THE COURT: Sure.

MS. MILLER: - - to discuss this with my client?

THE COURT: Of course. Yeah. Why don't we take a ten-minute recess.

MS. MILLER: Thank you, Your Honor.

SHERIFF'S OFFICER: All rise.

(Brief Recess)

SHERIFF'S OFFICER: All rise.

THE COURT: Thank you. Please be seated, everyone. Ms. Miller, what is - - what are - - is your client's intention?

MS. MILLER: Your Honor, before we went into this area, I wanted to discuss this with my client. And we've raided an issue in our brief that I'm not sure if You Honor read the Haines v. Liggett Group case. That in cases such as this, where the attorney/client privilege is invoked, the Court has made it clear and said:

"This too must be said, because of the sensitivity surrounding the attorney/client privilege, care must be taker that, following any determination that exception applies, the matters covered by the exception be kept under seal or appropriate court-imposed privacy procedures until all avenues of appeal are exhausted."

With that said and under this case and from the 3rd Circuit, the respondent Koresko and Associates, P.C. is willing to produce these documents to the Court, under seal, to be kept until the appeal is exhausted.

THE COURT: All right. I mean, I - - that is not acceptable to the Court. I mean, Ms. Appetta, is that something that you would agree to?

MS. APPETTA: No, Your Honor.

THE COURT: No and that would not be anything that would seem to me to make sense. No, really, all I want to know now is, one - - if you have any other arguments, of course I'll hear them, but that, also, what is your intention? But I - - let me just make one comment, Ms. Miller and I say this with all respect.

You know, you're doing the attorney/client privilege. but what we're talking about, to a large extent, are transaction documents, third-party checks that Ms. - - for example. I mean, really, so much of what you - - the documents you have are - - it's hard to imagine what your privilege argument is. That's just an aside, because we've been through all this. But I must tell, you it's - - transaction documents, I can't imagine how they could be attorney/client privilege.

But in any event, ma'am, really what I'm interested now is what is the intention of your client?

MS. MILLER: Your Honor, I do want to address one argument that - -

THE COURT: Sure.

MS. MILLER: - - Your Honor had - - I'm sorry, not argument, one concern that Your Honor had with this. And you were talking about the checks an all these other - -

THE COURT: The what, ma'am?

MS. MILLER: You were talking about checks and such that - -

THE COURT: Checks, oh.

MS. MILLER: Yes, sorry. Checks. My mid-west tone coming out. The person that was getting the checks in this case, and I am not sure if that was really made clear, was Community Trust Company, would be the possessor of certain of those documents. Your Honor has that other case in front of her. CTC - -

THE COURT: Right. No, I under - -

MS. MILLER: - - will not produce - -

THE COURT: No, I understand, ma'am. But, you see, if you don't - - if Koresko and Associates doesn't have documents, they can't produce them.

MS. MILLER: Yes.

THE COURT: So, if what you're saying is, some documents they don't have, but the other Community Trust has, that's fine. You can't produce what you don't have.

MS. MILLER: Yes.

THE COURT: But you gave me a whole stack of example of documents that Koresko and Associates and/or Penn-Mont has, right, in their possession. I reviewed them carefully, spent hours, did my very best concluded that most of them were just not privileged or otherwise subject to not being produced.

So, that's what we're talking about, which I assume were documents from Koresko and Associates, as opposed to Community Trust. So, that's a separate issue I'll get to, I guess it's the 31st, when I have a hearing on the enforcement of the subpoena. But if you're telling me that they have documents and you don't, that's - - but you don't have to give what you don't have.

MS. MILLER: Yes, Your Honor. But Your Honor had that concern that we wre withholding those type of documents. A lot of those documents, as I , you know, aer held by Community Trust and - -

THE COURT: All right. But if you have them, you have to give them too, is the point.

MS. MILLER: And we'd also and I know Your Honor will probably - - but, in this case, use of the exceptions raised by Community Trust Company that certain of these records are covered by Gram-Leach-Bliley, that we

also have to look at that in this case and I don't think that Your Honor really made an order on Gram-Leach-Bliley.

THE COURT: I looked at everything you argued to me before, ma'am, and I'll certainly, on the 31st, deal with it. But at this point in time, we've got an order and I just really want to know how you want to proceed. I mean, we don't - - I don't know that we need to go on anymore. You are not prepared at this point and that's fine, if you want to continue to talk to your client about it.

This is what I 'm going to do. I'm not going to order incarceration at this moment. I will take it under advisement. But I will say, Ms. Miller, that your client, as the owner of Koresko and Associates, should get things in order. Because if I do order incarceration, I'm not going to wait 30 days or 20 days later or 10 days, it's going to happen immediately. It will be coercive, as soon as he 's willing to produce the documents, he of course would be able to, you know, to get out of prison.

But I am not sure at this point what else I can do. I keep having herings, actually hoping that we can resolve this, but we obviously can't. So, I don't know that there's anything more we can do at this point. Is there any other argument? And, ma'am, Ms. Appetta, you'll give the Court and counsel a listing of your - - a breakdown of your time?

MS. APPETTA: Yes, Your Honor.

THE COURT: And then, Ms. Miller, you can have ten days to object to that, if you would like. And then, if you want to reply, Ms. Appetta, of course you can have the time to do that. Did you have anything else?

MS. APPETTA: Yes, Your Honor. Just two quick things.

THE COURT: Yeah, sure.

MS. APPETTA: I would also ask that the fees for this action also be put into any type of order.

THE COURT: Sure and submit that as well.

MS. APPETTA: Okay. And also, you have represented that Koresko and Associates and Penn-Mont are certainly in contempt and I would ask, also, that Mr. Koresko be adjudged in contempt, as well.

THE COURT: As the owner.

MS. APPETTA: Yes.

THE COURT: Absolutely, yes.

MS. APPETTA: Thank you.

THE COURT: Yeah. My understanding is, Mr. Koresko doesn't have any documents, personally. We don't know.

MS. APPETTA: Yeah.

THE COURT: It's not clear. Yeah. But as, certainly, as the owner and the case law is clear that the owner of a corporation who has control over the production is the person who gets incarcerated and gets held in contempt - - yes, ma'am - - as well as the corporation. Yes, ma'am?

MS. MILLER: Your Honor, I did want to, you know, with - - regarding the production of these documents.

We do understand the arguments before this Court and the importance of complying with this order. We will produce the documents after the exhaustion of the 3rd Circuit appeal in this case.

And everything is up-on appeal and we hope that a, you know, that the appeal will be, you know, heard within, you know, a matter of, you know, two to three months. We're actually going to make a motion to see if, because of the nature of these proceedings, that we can get the 3rd Circuit to hear this case sooner on an emergent basis.

THE COURT: You haven't asked for them to expedite it before now?

MS. MILLER: I had talked to the DOL counsel, which is Gail Perry, and I hadn't gotten an answer back from her.

THE COURT: Well, you don't need - -

MS. MILLER: Because, normally - -

THE COURT: - - them to, you just ask the court of appeals, when you have something that is of importance to your client, to - - otherwise, I mean, if the court - - if it's not expedited, I think the court of appeals time is - - well, I don't want to say, because I don't know what their timing is currently, but obviously, they have many, many, many cases.

Ma'am, you see, the problem is, this has been dragging on from the beginning. I don't know when we first came together, but it was, I think, June, May? When was it, Ms. Appetta?

MS. APPETTA: May.

THE COURT: May.

MS. APPETTA: It was in May, Your Honor.

THE COURT: It was in May. And every time alon the way, I have extended my - - I have given a stay of m order and every time along the way, advantage has bee taken. The court of appeals, you didn't go up to the court o appeals until the day or the - - almost the last day of my sta and now you're telling me you haven't even asked for it t be expedited. No, I will not wait.

The - - what happens is, when a judge issues an or der, you can ask for a stay, which I gave you so that yo could appeal to the - - go up to the court of appeals and as them for a stay. I gave you that time. The court of appeal has rejected that. Had they agreed, of course you woul have a stay. But the court of appeals rejected your motion. so I have an order outstanding that must be complied wit you didn't even ask for the appeal to be expedited. So, I really will not wait, no.

Everybody, the people are in contempt. Mr. Kore sko, Koresko and Associates, Penn-Mont. $12,500 was due in coercive fine as of, I think, yesterday. It will continue on. I will do an order to the clerk's office, so that they under stand. It was my fault, because I didn't do that order fo them, that you will be submitting that check. And I will is sue an order with respect to the request for incarceration and if I do grant in - - the motion, then Mr. Koresko will have to report to the marshal's office hare in this building on a cer tain day and time.

All right, counsel, anything else. Ms. Appetta? Ms. Roller?

MS. APPETTA: No, Your Honor.

THE COURT: Ms. Miller?

MS. MILLER: No, Your Honor.

THE COURT: All right. Thanks very much, we are hereby adjourned.

SHERIFF'S OFFICER: All rise.

(Adjourned at 12:31 p.m.)

CERTIFICATION

I, TERRY L. DeMARCO, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

_____

Terry L. DeMarco

_____

Patricia A. Hallman, T-312

March 17, 2005

Date

EXHIBIT 3

SCA3 Docket Sheet for 05-1440

General Docket

US Court of Appeals for the Third Circuit

Court of Appeals Docket #: 05-1440 Filed: 2/15/05
Nsuit: 1890 Other Statutory Actions
Secretary Labor v. Koresko, et al
Appeal from: Eastern District of Pennsylvania

Lower court information:

District: 0313-2 : 04-mc-00074
Trial Judge: Mary A. McLaughlin, District Judge
Date Filed: 4/19/04
Date order/judgment: 1/11/05
Date NOA filed: 2/9/05

USCA3 Docket Sheet for 05-1440

8/15/05	ORDER (Fisher, and Becker, Authoring Judge, Circuit Judges) granting motion by appellants for stay of contempt proceedings in the District Court pending resolution of certain appeals currently pending in the Court More specifically, the contempt proceedings shall be stayedpending resolution of the appeal at C.A. 04-3614 (dealing with the underlying merits), and the appeals at C.A. Nos.05-1440, 05-1946, and 05-2673 (which deal with

the validity of the contempt proceedings). The appeal at 04-3614 is fully briefed and calendared for September 29, 2005. The appeals at C.A. Nos. 05-1440, 05-1946, and 05-2673 shall be expedited and listed before the same panel. The Clerk shall promulgate a revised briefing schedule for appellee's brief and appellants' reply brief in those appeals. It is noted that appellants' brief and appendix have already been filed, filed. E-70. (crg) [05-1440 05-1946 05-2673]

8/15/05 Certified copy of order to Lower Court. (crg)

[05-1440 05-1946 05-2673

EXHIBIT 4

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

ELAINE CHAO, SECRETARYOF LABOR, U.S. DEPARTMENT OF LABOR,
Petitioner,

Case No.: 04-MC:00074 (MAM)

-vs-

JOHN J. KORESKO, V;
REGIONAL EMPLOYERS' ASSURANCE LEAGUES;
DELAWARE VALLEY LEAGUE;
PENN-MONT BENEFIT SERVICES, INC.;
and KORESKO & ASSOCIATES.
Respondents.

DECLARATION of INVASION OF PRIVACY by DOL and OTHER UNNAMED PARTIES
by a
BENEFICIARY of REAL VEBA TRUST

1. I have been a participant and beneficiary of a death plan under the REAL VEBA TRUST.

2. I joined the welfare benefit plan sponsored by REAL to provide death benefits for the employees of my firm.

3. The plan has always provided death benefits to numerous employees of my firm on a nondiscriminatory basis and my firm would not likely have provided such benefits if it was not tax advantaged.

4. In joining the plan I relied on financial and tax advice provided by John Koresko, V, and his law firm Koresko & Associates, P.C.

5. I was fully aware and approved of the purchase of permanent and term life insurance to provide death benefits for the employees of my firm.

6. The REAL VEBA TRUST was under the control of the Trustee or Plan Administrator, not me or my employees.

7. I signed a Limited Power of Attorney in John J. Koresko, V, which states in relvant part:

LIMITED POWER OF ATTORNEY

The undersigned Employee hereby appoints Penn-Mont Benefit Services, Inc. ("Penn-Mont"),the present plan administrator and John J. Koresko, V, Esquire secretary of the plan committee, or their authorized agent, employee, or delegate, to serve as Limited Attorney in Fact with respect to all matters connected with any and all matters relating to the procurement and maintenance of benefits payable to Employee pursuant to REAL VEBA and the Employer's Welfare Benefit Plan. Without limit-

ing the generality of the foregoing, the Limited Attorney in Fact shall have the authority to complete and execute any and all documents on behalf of Employee, including applications for insurance coverage, orders to secure, exchange, or terminate insurance contracts, or any other document considered by the plan administrator, in its sole and absolute discretion, to be incident to administration or operation of the plan. This limited power of attorney shall be irrevocable so long as REAL VEBA is in existence, and shall not be affected by Employee's subseqnent disability, incapacity, incompetency or death. Employee agrees, for itself, its heirs, personal representatives, successors and assigns, to release the REAL VEBA Trustee, Penn-Mont, Mr. Koresko, their agents, employees, successors and assigns, and any other third parties who rely on the validity of this document, from any liability which may result from any action taken in reliance on or in connection with this document and the powers granted hereunder.

8. It was my intent when signing that document that John Koresko and his law firm would represent me and protect my interests as a participant and beneficiary.

9. I specifically intended that if any federal investigatory agency, such as the Department of Labor ["DOL"] or Internal Revenue Service ["IRS"] should seek my identity, medical, financial or tax information that John Koresko and his law firm would prevent it.

10. I would not have joined the Plan if I ever thought that my identity or personal information were not protected by being a client of John Koresko and his law firm.

11. I believe that I have constitutional, statutory and common law rights which protect my identity and information given to John Koresko and the law firm.

12. In the attached dated May 5, 2005, I directed that John Koresko and his law firm not disclose my identity, medical, personal tax or financial information.

13. I retained the Koresko Law Firm to fight the subpoenas issued and protect my privacy rights.

14. At approximately 1:00 p.m., on January 13, 2006, my firm received a telephone call from Fred Siegert, who identified himself as an investigator for DOL working on a case in Philadelphia, with a return telephone number of 215 861 5319. He asked me to return his call on January 23 or January 24.

15. I believe that Mr. Koresko complied with my request and did not disclosure my identity to DOL.

16. Mr. Koresko has my full support in taking the actions required to protect my identity from illegal disclosure.

17. It hereby direct Mr. Koresko to intervene on my behalf in any proceeding as required to protect me and to institute action in my name against those persons responsible for this invasion of my privacy.

18. I understand that this statement will not be under seal as DOL apparently already has my name and contact information.

BY: _____

John Braddock

DATE: _____

WITNESSTH:

_____

Signature of Witness

Dated: 1/18/06

DIRECTIVE NOT DISCLOSE TO DOL/IRS
AND
RETAINER TRANSMITTAL

TO THE KORESKO LAW FIRM:

I have been advised that the Koresko Law Firm has been served with subpoenas by the United States Department of Labor ["DOL"] for information pertaining to the REAL VEBA. The documents requested include but are not limited to personal medical, financial, tax and estate planning information about my firm and its employees. I understand that DOL is likely to share such information with the United States Internal Revenue Service, and that such information sharing may result in a tax audit of the persons identified.

I understand that the Koresko Law Firm has refused to surrender this information unless the identity of the persons involved is stricken from the documents, and that the DOL has refused that offer. I have been advised that a federal judge is currently considering the incarceration of the principal of Koresko Law Firm, John J. Koresko, V, Esquire, CPA, for his refusal to surrender the identity of this firm, its principal and its employees.

Intending to be bound hereby, I hereby direct the Koresko Law Firm not to release any identity information about my firm, me or my employees to the DOL/IRS as requested by subpoena, and release and hold harmless the Koresko Law Firm, PennMont Benefit Services, Inc., REAL VEBA Trust, Community Trust Company, all their respective agents, as

signs, predecessors and successors, and any other entity required to act in order to comply with this directive.

I ___ [enclose] ___ [authorize from plan assets] the amount of $2,000.00 with this directive to retain the Koresko Law Firm to fight the subpoenas issued and protect my privacy rights.

BRADDOCK CONSTRUCTION, INC.

Date 5/10/05

_____

Mr. John Braddock, for the Firm and Individually

Date

_____

[second signator], for the Firm and Individually

RETURN THIS DOCUMENT TO:
Koresko Law Firm
200 West Fourth Street
Bridgeport, PA 19405

EXHIBIT 5

U.S. Department of Labor
Employee Benefits Security Administration
Philadelphia Regional Office
The Curtis Center – Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317
Phone: (215) 861-5300
Telefax: (215) 861-53

Certified Main No.: 7004 2510 0003 3675 0069
Return Receipt Requested

November 18, 2005

Ms. Irina Paritsky, Subpoena Specialist
Commerce Bank
Research Department
11000 Atrium Way
Mt. Laurel, NJ 08054

Re: Regional Employers' Assurance League Voluntary Employees' Beneficiary Association Health & Welfare Benefit Plan

Dear Ms. Paritsky:

This office is conducting an investigation of the above-referenced health care benefit program pursuant to Section 504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1134(a)(1), to determine whether any person has violated or is about to violate any provision of Title 1 of ERISA.

Accompanying this letter is a subpoena duces tecum directed towards Commerce Bank requiring the production of certain specified documents. These documents are necessary and relevant to the above-referenced investigation. Your personal appearance pursuant to this subpoena will not be required, provided the documents as required in the subpoena are produced.

Please Note: If any account that is responsive to this subpoena is maintained in the name of an individual or a partnership of five or fewer individuals, please do NOT produce the documents relating to the account at this time. Instead, please provide only the name in which the account is maintained, so that we may comply with the notice requirements of the Right to Financial Privacy Act, 12 U.S.C. §3401 et seq.

If you have any questions, please contact Senior Investigator Fred Siegert of my staff at (215) 861-5319. In the absence of any expressly agreed alternative procedure, we will expect full compliance with the subpoena at the time and place indicated therein.

Sincerely,

Mabel Capolongo
Regional Director
Philadelphia Region

Enclosures

SUBPOENA
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
Employee Benefits Security Administration

To: Commerce Bank
11000 Atrium Way
Mt. Laurel, NJ 08054

You are hereby required to appear before Senior Investigator Fred Siegert of the Employee Benefits Security Administration, U.S. Department of Labor, at The Curtis Center, Suite 870 West, 170 S. Independence Mall West, in the City of Philadelphia, Pennsylvania on the 5th day of December, 2005 at 10 o'clock a.m. of that day, to testify in the matter of an investigation of the Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Association Health & Welfare Benefit Plan being conducted pursuant to Section 504 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1134, in order to determine whether any person has violated or is about to violate any provision of Title I of ERISA or day regulation or order thereunder;

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: See attached.

Fail not at your peril.

In testimony whereof I have hereunto affixed my signature and the seal of the United States Department of Labor

in Philadelphia, Pennsylvania

this 18th day of November, 2005

Mable Capolongo, Regional Director

Attachment of Subpoena
for
COMMERCE BANK

A. Definitions and Instruction

1. The term "document" or "documents" means "recordings" within the meaning of Section 1001 of the Federal Rules of Evidence, consisting of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. Such documents shall include all such writings or recordings, of every kind and regardless of where located, which are within your possession, custody, or control, or the possession custody, or control of any agent, employee, representative, or other persons acting or purporting to act for or on your behalf, including, but not limited to, contracts, agreements, correspondence, memoranda, reports, plan amendments, plan resolutions, letters, notices, authorizations, ledger books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, work papers, notes, drafts, copies, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, reports or summaries of negotiations, marginal notations, bills, invoices, checks, bank statements, lists, journals, computer tapes and cards, and all other written, printed, recorded or photographic matter of sound reproduction, however produced or reproduced.

2. The term "communications" shall mean or refer to all inquiries, agreements, understandings, meetings, telephone conversations, letters, notes, telegrams, telexes, cables advertisements, computer programs, diskettes, electronic mail system, and other forms of verbal intercourse, whether oral or written.

3. The terms "relating to" or "relate to" mean constituting, referring to, pertaining to, or containing any information which in any way concerns, affects, or describes the terms or conditions, or identifies facts, with respect to the subject of the inquiry.

4. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive than exclusive.

5. The use of the word "including" shall be construed to mean "without limitation."

6. The term "Bank" shall mean Commerce Bank and its parent companies, any predecessor or successor corporations, and any subsidiaries or affiliates.

7. The terms "affiliate" or "affiliated entities" shall be construed to mean corporations, partnerships, or other legal entities under common ownership or common control, including but not limited to, patent and subsidiary corporations.

8. The term "bank account" means an account of any type of account, including checking, savings, money market, brokerage, custodial or trust accounts, offered by the Bank for use by its customers.

9. The terms "Plan" or "Plans" mean any employee welfare benefit plan as defined in section 3(1) of the Employers Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1002(1).

10. The term "VEBA" shall mean a voluntary employees beneficiary association.

11. The term "Community Trust" shall mean Community Trust Company, a Pennsylvania corporation, and any predecessor or successor corporations, subsidiaries or affiliated entities.

12. The terms "Regional Employers' Assurance League" "Regional Employers" Assurance Leagues or "REAL" shall mean any association or associations of employers, including subsidiaries or affiliates, known by or which uses such a name.

13. The terms "Regional Employers' Assurance League Trust," "Regional Employers' Assurance Leagues Trust," "REAL Trust", "Regional Employers' Assurance League Voluntary Employees Beneficiary Association Trust," "Regional Employers' Assurance Leagues Voluntary Employees Beneficiary Association Trust", or "REAL VEBA Trust" shall mean any trust formed in relation to the Regional Employers' Assurance League, Regional Employers' Assurance Leagues, REAL, Penn-Mont and any other person or corporation.

14. The terms "Delaware Valley League" or "DVL" shall mean any association or associations of employers, including subsidiaries or affiliates, known by or which uses such a name.

15. The terms "Delaware Valley League Trust," "DVL Trust" "Delaware Valley League Voluntary Employees Beneficiary Association Trust" or "DVL VEBA Trust" shall mean any trust formed in relation to the Delaware Valley League, DVL, Penn-Mont and any other person or corporation.

16. The term "Koresko & Associates" shall mean a Pennsylvania professional corporation doing business by that name and any predecessor or successor corporations, subsidiaries or affiliated entities.

17. The term "Penn-Mont" shall mean Penn-Mont Benefit Services, Inc., a Pennsylvania corporation, and any predecessor or successor corporations, subsidiaries or affiliated entities.

18. "John J. Koresko" unless otherwise specified shall mean John J. Koresko, not as an individual, but in his capacity as an officer, director, trustee, or agent of, or on behalf of REAL, REAL Trust, REAL VEBA trust, DVL, DVL Trust, DVL VEBA Trust Penn-Mont and/or Koresko & Associates.

19. "Lawrence Koresko" unless otherwise specified shall mean Lawrence Koresko, not as an individual, but in his capacity as an officer, director, trustee, or agent of, or on behalf of REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust, Penn-Mont and/or Koresko & Associates.

20. Unless otherwise specified, the time period covered by this request is from January 1, 2001, to the date of final production. This shall be referred to as the relevant time

period. Documents created prior to January 1, 2001, but which have been used or relied upon by the Bank since January 1, 2001, or which describe legal duties which remain in effect after January 1, 2001, (such as contracts and trust agreements), shall be produced in response to this request.

21. If any documents are withheld because of a claim of privilege, please provide us with a list of the documents you claim are privileged. The list of withheld documents should identify, (A) the specific privilege being asserted; (B) the nature of the document (i.e., letter, memorandum, etc.); (C) the author of the document and the date it was prepared; (D) the recipient of the document and all individuals who received copies of ie, and (E) the subject matter of the document.

B. Documents to be Produced

1. All documents identifying bank or brokerage accounts opened or established with the Bank in the name of, or for use by, Community Trust.

2. All documents identifying bank or brokerage accounts opened or established with the Bank in the name of, or for use by, Community Trust that relate to REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, Penn-Mont, Koresko & Associates, John J. Koresko, Lawrence Koresko, any VEBA or Plan relating to these persons or entities or any party representing any such VEBA or Plan.

3. Signature cards related to all bank or brokerage accounts identified in response to items #1 and #2.

4. Monthly account statements for all bank or brokerage accounts identified in response to items #1 and #2.

5. Deposit slips with copies of all items deposited in all bank or brokerage accounts identified in response to items #1 and #2.

6. Canceled check, including copies of the front and back of each, for all bank or brokerage accounts identified to response to items #1 and #2.

7. Documents relating to withdrawals from all bank or brokerage accounts identified in response to items #1 and #2.

8. Documents identifying any electronic fund transfers relating to all bank or brokerage accounts identified in response to items #1 and #2, including, but not limited to debit memos, credit memos and wire transfer instructions.

9. All documents identifying transfers of any kind between or among all bank or brokerage accounts identified in response to items #1 and #2.

10. All documents identifying and describing the nature of any special account features, such as trust account, brokerage accounts or lines of credit that may have been established in connection with all bank accounts or brokerage accounts identified in response to items #1 and #2.

11. All trust agreements or other arrangements of any kind entered into between Bank and Community Trust.

12. All contracts, service agreements, agreements of any kind, letters of engagement or similar documents between Bank and Community Trust, any VEBA or Plan relating to

Community Trust or any party representing any such VEBA or Plan.

13. All plan descriptions and/or plan documents, including all amendments thereto; and summary plan descriptions related to any VEBA or Plan related to Community Trust.

14. All administrative materials, including benefit allocation reports, annual reports, audits and minutes of bank trustee and trust administrative committee meetings insofar as they relate to the Bank's administration of any bank or brokerage accounts identified in response to items #1 and #2.

15. All documents relating to any investments held by the bank in relation to any bank or brokerage accounts identified in response to items #1 and #2, including life insurance policies, listings of investments, transaction reports, brokerage account statements, investment manager reports, records of real estate transactions or loans, and any minutes or other record of Bank investment committee meetings.

16. All correspondence including internal memoranda or notes, received or generated by the Bank in relation to any transaction, contacts, communications or other business involving Community Trust, any VEBA or Plan relating to Community Trust or any party representing any such VEBA or Plan.

17. All documents relating to any complaints or inquiries concerning Community Trust, and VEBA or Plan relating to Community Trust or any party representing any such VEBA or Plan.

18. All documents relating to any lawsuits or other legal proceedings concerning Community Trust, any VEBA or

Plan relating to Community Trust or any party representing any such VEBA or Plan.

EXHIBIT 6

U.S. Department of Labor
Employee Benefits Security Administration
Philadelphia Regional Office
The Curtis Center – Suite 870 West
170 S. Independence Mall West
Philadelphia, PA 19106-3317
Phone: (215) 861-5300
Telefax: (215) 861-53

February 25, 2005

Certified Main No.: 7099 3400 0017 3970 8958
Return Receipt Requested

Ms. Irina Paritsky, Subpoena Specialist
Commerce Bank
Research Department
11000 Atrium Way
Mt. Laurel, NJ 08054

Re: Regional Employers' Assurance League Voluntary Employee's Beneficiary Association Health & Welfare Benefit Plan

Dear Ms. Paritsky:

This office is conducting an investigation of the above-referenced health care benefit program pursuant to Section 504(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.A.C. §1134(a)(1), to determine

whether any person has violated or is about to violate any provision of Title 1 of ERISA.

Accompanying this letter is a subpoena *duces tecum* directed towards Commerce Bank requiring the production of certain specified documents. These documents are necessary and relevant to the above-referenced investigation. Your personal appearance pursuant to this subpoena will not be required, provided the documents as required in the subpoena are produced.

Please Note: If any account that is responsive to this subpoena is maintained in the name of an individual or a partnership of five or fewer individuals, please do NOT produce the documents relating to the account at this time. Instead, please provide only the name in which the account is maintained, so that we may comply with the notice requirements of the Right to Financial Privacy Act, 12 U.S.C. §3401 et seq.

If you have any questions, please contact Senior Investigator Fred Siegent of my staff at (215) 861-5319. In the absence of any expressly agreed alternative procedure, we will expect full compliance with the subpoena at the time and place indicated therein.

Sincerely,

Mabel Capolongo
Regional Director
Philadelphia Region

Enclosures

SUBPOENA
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR
Employee Benefits Security Administration

To: Commerce Bank
11000 Atrium Way
Mt. Laurel, NJ 08054

You are hereby required to appear before Senior Investigator Fred Siegert of the Employee Benefits Security Administration, U.S. Department of Labor, at The Curtis Center, Suite 870 West, 170 S. Independence Mall West, in the City of Philadelphia, Pennsylvania on the 5th day of December, 2005 at 10 o'clock a.m. of that day, to testify in the matter of an investigation of the Regional Employers' Assurance Leagues Voluntary Employers' Beneficiary Association Health & Welfare Benefit Plan being conducted pursuant to Section 504 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1134, in order to determine whether any person has violated or is about to violate any provision of Title I of ERISA or day regulation or order thereunder;

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: See attached.

Fail not a your peril.

In testimony whereof I have hereunto affixed my signature and the seal of the United States Department of Labor

in Silver Spring, Maryland

this 25th day of January, 2005

Mable Capolongo, Regional Director

Attachment of Subpoena
for
COMMERCE BANK

A. Definitions and Instruction

1. The term "document" or "documents" means "recordings" within the meaning of Section 1001 of the Federal Rules of Evidence, consisting of letters, words or numbers or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. Such documents shall include all such writings or recordings, of every kind and regardless of where located, which are within your possession, custody, or control, or the possession custody, or control of any agent, employee, representative, or other persons acting or purporting to act for or on your behalf, including, but not limited to, contracts, agreements, correspondence, memoranda, reports, plan amendments, plan resolutions, letters, notices, authorizations, ledger books, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, work papers, notes, drafts, copies, graphs, charts, accounts, analytical records, minutes or records of meetings or conferences, reports or summaries of negotiations, marginal notations, bills, invoices, checks, bank statements, lists, journals, computer tapes and cards, and all other written, printed, recorded or photographic matter of sound reproduction, however produced or reproduced.

2. The term "communications" shall mean or refer to all inquiries, agreements, understandings, meetings, telephone conversations, letters, notes, telegrams, telexes, cables advertisements, computer programs, diskettes, electronic mail system, and other forms of verbal intercourse, whether oral or written.

3. The term "relating to" or "relate to" mean constituting, referring to, pertaining to, or containing any information which in any way concerns, affects, or describes the terms or conditions, or identifies facts, with respect to the subject of the inquiry.

4. The words "and" and "or" shall be construed conjunctively or disjunctively as necessary to make the request inclusive than exclusive.

5. The use of the word "including" shall be construed to mean "without limitation."

6. The term "Bank" shall mean Commerce Bank and its parent companies, any predecessor or successor corporations, and any subsidiaries or affiliates.

7. The terms "affiliate" or "affiliated entities" shall be construed to mean corporations, partnerships, or other legal entities under common ownership or common control, including but not limited to patent and subsidiary corporations.

8. The term "bank account" means an account of any type of account, including checking, savings, money market, brokerage, custodial or trust accounts, offered by the Bank for use by its customers.

9. The terms "Plan" or "Plans" mean any employee welfare benefit plan as defined in section 3(1) of the Employers Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1002(1).

10. The term "VEBA" shall mean a voluntary employees beneficiary association.

11. The terms "Regional Employers' Assurance League" or "REAL" shall mean any association or associations of employers, formal or informal, including subsidiaries or affiliates, known by or which uses such a name.

12. The terms "Regional Employers' Assurance League Trust," REAL Trust", "Regional Employers' Assurance League Voluntary Employees Beneficiary Association Trust" or "REAL VEBA Trust" shall mean any trust formed in relation to the Regional Employers' Assurance league, REAL, Penn-Mont and any other person or corporation.

13. The terms "Delaware Valley League" or "DVL" shall mean any association or associations of employers, formal or informal, including subsidiaries or affiliates, known by or which uses such a name.

14. The terms "Delaware Valley League Trust," "DVL Trust," "Delaware Valley League Voluntary Employees Beneficiary Association Trust" or "DVL VEBA Trust" shall mean any trust formed in relation to the Delaware Valley League, DVL, Penn-Mont and any other person or corporation.

15. The term "Koresko & Associates" shall mean a Pennsylvania professional corporation doing business by that name and any predecessor or successor corporation, subsidiaries or affiliated entities.

16. The term "Penn-Mont" shall mean Penn-Mont Benefit Services, Inc., A Pennsylvania corporation, and any predecessor or successor corporations, subsidiaries or affiliated entities.

17. "John J. Koresko" unless otherwise specified shall mean John J. Koresko in his capacity as an officer, director, trustee, or an agent of, or on behalf of, REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust, Penn-Mont and/or Koresko & Associates.

18. "Lawrence Koresko" unless otherwise specified shall mean Lawrence Koresko in his capacity as an officer, director, trustee, or agent of, or on behalf of, REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust, Penn-Mont and/or Koresko & Associates.

19. The term "Community Trust" shall mean Community Trust Company, a Pennsylvania corporation, and any predecessor or successor corporations, subsidiaries or affiliated entities.

20. Unless otherwise specified, the time period covered by this request is fro January 1, 2001, to the dated of final production. This shall be referred to as the relevant time period. Documents created prior to January 1, 2001, or which describe legal duties which remain in effect after January 1, 2001, (such as contracts and trust agreements), shall be produced in response to this request.

21. If any documents are withheld because of a claim of privilege, please provide us with a list of the documents you claim are privileged. The list of withheld documents should identify: (A) the specific privilege being asserted; (B) the nature of the document (i.e, letter, memorandum, etc; (C) the author of the document and the date it was prepared; (D) the recipient of the document and all individuals who received copies of it; and (E) the subject matter of the document.

B. Documents to be Produced:

1. All documents identifying bank accounts opened or established with the Bank in the name of, or for use by, REAL, REAL Trust, or REAL VEBA Trust.

2. All documents identifying bank accounts opened or established with the Bank in the name of, or for use by, DVL, DVL Trust, or DVL VEBA Trust.

3. All documents identifying bank accounts opened or established with the Bank in the name of, or for use by, Penn-Mont;

4. All documents identifying bank accounts opened or established with the Bank in the name of, or for use by, Koresko & Associates.

5. All documents identifying bank accounts opened or established with the Bank in the name of, or for use by, any VEBA, Plan or trust established in connection with or relating to REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust, Community Trust, Penn-

Mont, Koresko & Associates or any party representing any such VEBA, Plan or trust..

6. All documents identifying bank accounts opened or established with the Bank in the name of, or for use by, any VEBA, Plan or trust established in connection with or relating to REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA, Trust, Community Trust, Penn-Mont, Koresko & Associates, John J. Koresko or Lawrence Koresko.

7. Signature cards related to all bank accounts identified in response to items #1 through #6.

8. Monthly account statements for all bank accounts identified in response to items #1 through #6.

9. Deposit slips with copies of all items deposited in all bank accounts identified in response to items #1 through #6.

10. Canceled checks, including copies of the front and back of each, for all bank accounts identified in response to items #1 through #6

11. Documents relating to withdrawals from all bank accounts identified in response to items #1 through #6.

12. Documents identifying any electronic fund transfers relating to all bank accounts identified in response to items #1 through #6, including, but not limited to, debit memos, credit memos and wire transfer transactions.

13. All documents identifying transfers of any kind between or among all bank accounts identified in response to items #1 through #6.

14. All documents identifying and describing the nature of any special account features, such as trust account, brokerage accounts or lines of credit that may have been established in connection with all bank accounts identified in response to items #1 through #6.

15. All trust agreements or other arrangements of any kind entered into between Bank and REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust, Community Trust, any VEBA or Plan established in relation to any of these entities or any party representing any such VEBA or Plan.

16. All contracts, service agreements, letters of engagements or similar documents between Bank and REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust, Community Trust, Penn-Mont, Koresko & Associates, any VEBA or Plan established in relation to any of these entities or any party representing any such VEBA or Plan.

17. All plan description and/or plan documents, including all amendments thereto; trust agreements; including all amendments thereto; and summary plan descriptions relating to any VEBA or Plan established in connection with or relating to REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust.

18. All administrative materials, including benefit allocation reports, annual reports, audits and minutes of bank

trustee and trust administrative committee meetings insofar as they relate to the Bank's administration of any account or contract relating to any VEBA or Plan established in connection with or relating to REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust or DVL VEBA Trust.

19. All documents relating to any investments held by the Bank in relation to any bank account identified in response to items #1 through #6, including life insurance policies, listings of investments, transaction reports, brokerage account statements, investment manager reports, records of real estate transactions or loans, and any minutes.

20. All correspondence, including internal memoranda or notes, received or generated by the Bank in relation to any transactions, contracts, communications or other business involving REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust, Penn-Mont, Koresko & Associates, any VEBA or Plan relating to these entities or any party representing any such VEBA or Plan.

21. All documents received by the Bank relating to any complaints or inquiries concerning REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust, Penn-Mont, Koresko & Associates, any VEBA or Plan relating to these entities or any party representing any such VEBA or Plan.

22. All documents received by the Bank relating to any lawsuits or other legal proceedings concerning REAL, REAL Trust, REAL VEBA Trust, DVL, DVL Trust, DVL VEBA Trust, Penn-Mont, Koresko & Associates, any

VEBA or Plan Relating to these entities or any party representing any such VEBA or Plan.

EXHIBIT 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Elaine L. Chao, Secretary of of Labor, United States Department of Labor, Plaintiff	)	05-MC-00018-MAM
vs.	)	Philadelphia, Pa January 4, 2006 9:28 a.m.
Community Trust Company Defendants.	)	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE MARY A. MCLAUGHLIN
UNITED STATES DISTRICT JUDGE

Appearances:

For the Plaintiff: Donald K. Neely, Esq.
U.S. Department of Labor
Office of the Solicitor
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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

THE COURT: Good morning everyone. Please seated. All right. We are here this morning in the case of the Secretary of labor versus Community Trust Company. And let me see who is here, because these are people - - I recognize Mr. Siegert, I don't recognize everyone else. Donald Neely, is that your name sir?

MR. NEELY: Yes, Your Honor.

THE COURT: And, Mr. Lowell Gates?

MR. GATES: Yes.

THE COURT: Good morning to everybody.

COUNSEL: Good morning.

THE COURT: All right. This has been an ongoing miscellaneous matter in which I've had various motions and made a lot of decisions. And, we're here today – I have a motion of CTC to stay enforcement of the Court's decision pending appeal. And, then I have the Secretary of Labor's amended and renewed motion for contempt and incarceration of Ms. Russell. And, is Ms. Russell not here?

MR. GATES: She is not, Your Honor.

THE COURT: And, sir, when you speak to the Court, if you would rise. And, why is that?

MR. GATES: We're – are going to rely on the facts of record to date.

THE COURT: You're not bringing her in for mitigation or is he the decision-maker in this matter? If I do decide to put - - incarcerate someone, is she the right person?

MR. GATES: Your Honor, the trust company has an eight member board of directors and those eight members have - - are aware of this case and they have contemplated its facts and its impact. And, they are the ones who have made the decision, at least for the time being, not to comply with the order.

THE COURT: So, if I incarcerate someone, it should be all eight of them?

MR. GATES: Yes, yes Your Honor.

THE COURT: Okay. Well, then I would suggest – this is what we're going to do, everybody, because I'm seriously considering it. I think Mr. Gates, this has got to come to an end. And, I know on Monday we have the matter with respect to Mr. Koresko. Is that correct, Mr. Neely?

MR. NEELY: Is that scheduled for --

THE COURT: Yes, maybe you didn't get my order yet.

MR. NEELY: I have not seen that, Your Honor.

THE COURT: Oh, I'm sorry. I scheduled the order to show cause for Monday morning.

MR. NEELY: Okay.

THE COURT: All right?

MR. NEELY: Great

THE COURT: And, so I will make sure they get faxed today if they haven't already. My secretary has been out for the holiday so that may not have gotten faxed. But let

me make sure that gets done. And, I think what we need to do, Mr. Gates, is I need to see whoever is the decision-maker, because this is a very serious motion for incarceration and I don't want to incarcerate someone whom I haven't seen. So I need to have in front of me the decision-maker so that I can explore mitigation. There is a lot of issues I have to explore, sir.

MR. GATES: Correct. Correct.

THE COURT: All right.

MR. GATES: If I could just say that within the last two weeks I've been in contact with Ellen Beard, who is their senior appellate attorney with the Department of Labor.

THE COURT: Okay.

MR. GATES: And, we've agreed on an expedited briefing schedule to the Third Circuit. The briefing will begin on January 13th with out initial brief and then we'll conclude with our reply brief on February 10th. So I think we've done as much as we can do to expedite the appeal to the Third Circuit so hopefully, within 35 days or so the briefing will be done and the Third Circuit will be in a position to make a decision.

THE COURT: But I thought you all told me this before, that the Third Circuit was going to make a decision in connection with the other matter so that I should stay my hand and not do anything until –

MR. GATES: Correct.

THE COURT: Excuse me, sir.

MR. GATES: I'm sorry.

THE COURT: -- I guess the oral argument was in September. And, obviously, the Court of Appeals affirmed my decision in that matter. But now – and I know that you or your colleague represented to me that – pretty confident that the Third Circuit was going to deal with these issues and it would be over then. But that didn't happen. So now you want me to wait again?

MR. GATES: Well, I think the initial appeal was just an expedited appeal, it wasn't a full appeal. We've now agreed with the Department of Labor to consolidate both the appeal of the contempt and the underlying enforcement action together as a consolidated matter. And, both of those are going to be briefed simultaneously according to the schedule.

THE COURT: But, sir, but I – you're not understanding what I'm saying. The appeal in connection with the Koresko matter, I was told by your colleague that I should please wait, as I did. I mean, I haven't – I've really done very little in terms of enforcing my orders at this point, other than to enforce and hold the CTC in contempt for failing to give what they promised to give. That's how I limited my order.

But I was told, Judge, on September 29th, there is going to be oral argument in the Koresko matter, these issues are going to be dealt with and so please stay your hand. That didn't happen. I mean, the Court of the Appeals affirmed my decision and as I read their decision, Mr. Neely, did the Court of Appeals deal with this Graham-Bleachp-Bli—

excuse me, the Graham-Leach-Bliley law and the other privacy arguments that CTC is making?

MR. NEELY: Your Honor, it has been some time since I reviewed that decision, but I believe that – those two issues were two of the four issues on appeal that were affirmed by the Court. But I can review that if you'd like.

THE COURT: Yes, all right. But I expect people when they come into my court, Mr. Neely, to know what's going on. I don't know how long you've been on the matter but that – a basic question for me is, where are you with the other case?

MR. NEELY: No.

THE COURT: Because, obviously, to the extent you've gotten documents from Mr. Koresko, you may not need them for CTC.

MR. NEELY: We have not received anything from Mr. Koresko, Your Honor.

THE COURT: All right. Everybody – I'm saying this to both sides. You all need to know what is going on in this matter. This is the first time I've seen the two of you. Ms. Russell needs to be here or whoever the decision-maker is. If there's an agreement – is there an agreement for the Court to wait in light of this agreement that Mr. Gates says he's made with the appellate attorney?

MR .NEELY: No. Your Honor. I've been in touch with Ellen Beard, I spoke to her yesterday. And, I'm aware that, you know, we've moved – the Department moved to expedite that matter, but to the extent that this matter is now

before this Court, the fact that we're trying to expedite it at the appellate level shouldn't negate the fact that this matter is before you. And, that – even with an expedited schedule, you know, we're looking at Spring, Summer, before those matters will be heard and resolved.

THE COURT: All right. And, Mr. Gates, why wasn't – why didn't you move for an expedited appeal months ago?

MR. GATES: We did, however, the Third Circuit declined our expedited appeal. So the only way we were going to resolve it was with Ellen Beard and I to together agree. Ellen filed a motion and the Clerk at the Third Circuit set the briefing schedule.

THE COURT: All right.

MR. GATES: So we were kind of able to work it out together that way.

THE COURT: All right. What I need is I need any paper – anybody is going to refer to or rely on in this hearing. I need the order of the Third Circuit denying your motion for expedited appeal. Then I need the new order that went up that you agreed to. I need you, Mr. Neely, to be thoroughly conversant with every decision in this matter and the Koresko matter. I am not going to put somebody in jail without complete – complete preparation by the Secretary of Labor. Where is Ms. Appetta and Ms. Roller? Where are they?

MR. NEELY: Ms. Appetta is no longer employed with the Department, she has moved on.

THE COURT: Okay.

MR. NEELEY: And, Ms. Roller is down at the office today.

THE COURT: All right. Well, sir, if you're going to represent the Secretary of Labor, I need the same level of representation that I got through Ms. Appetta, who I was very impressed with and seemed to be on top of everything. I need somebody who is going to be able to explain everything to me if you want me to seriously consider a motion to incarcerate someone. Are there any other new issues? Mr. Gates, how up to date are you on the Court's contempt fine?

MR. GATES: Okay. I was gonna – the contempt fines have been paid from September 26th through November 30th and Community Trust is in the process of making payment through December 15th. They're going to try to pay them on a two-week cycle.

THE COURT: Did you ask me for permission to do it in that way? And, I'm just a little surprised in a motion for incarceration you come into court without having the fine fully paid, the contempt fine. Because in a sense you're also now in violation of my order to pay. So there's two orders CTC is in violation of.

MR. GATES: Your Honor, we're simply paying them in kind of a systematic way.

THE COURT: And, who told you that was all right?

MR. GATES: We just—we made the assumption that rather than paying them daily, which I think would be administratively burdensome, that – to try to pay them in

some kind of systematic way so we don't end up, you know sending too many—

THE COURT: Mr. Gates, I think you're presuming an awful lot, sir. When you come into court – I had fully expected you were going to say to me, Your Honor, because I know you haven't paid up to date, at least as far as the office is concerned, that you were going to say, Your Honor, her is the check, we've given it in, we're now fully paid. Because you see you're now in violation of not just my order to produce the documents but my order to pay the $250 fine.

MR. GATES: Okay.

THE COURT: Do you understand, sir?

MR. GATES: We –

THE COURT: Do you under – I don't know if you do, though. Ms. Russell isn't here, I'm not sure that you understand that you're tying my hands. Every time I see people in these two matters you tie my hands more and more until I get to the point where I will have no choice but to put people in jail, whoever the decision-makers are. And, so for you to come in here and not have paid up to date puts you in violation of two orders. And, I don't know if you're not a litigator and you don't know how things work but, when a judge issues an order to pay daily, you don't decide to pay more systematically. I might agree to that if you would send me a motion asking me, but you haven't asked the Court if that is a proper way to comply with the contempt fine order. Do you understand, Mr. Gates?

MR. GATES: Yes. I'm sorry, Your Honor. We made the assumption that to do it every two weeks would be sufficient, I apologize.

THE COURT: I mean, you're counsel for this entity and they're getting in deeper and deeper.

MR. GATES: I agree, Your Honor.

THE COURT: And, I know – you seem to be all concerned about being sued by your—by Mr. Koresko but you need to consider other things as well. If you're a trust company that is under regulation by Federal or State authorities and you're violating two court orders, I would think that you would be more concerned about that than being sued by Mr. Koresko.

MR. GATES: We are, Your Honor. We are—

THE COURT: But so far you haven't reflected that. You just seem to be concerned about doing the bidding of others as opposed to the Court. And, I am really—my patience, I'm afraid, is pretty well shot at this point.

So on Monday morning I hereby order Susan Russell and the Board of Directors here, in my courtroom, if they're the decision-makers. Whoever is going to tell me they're the decision-maker and this is why they've made the decision. Whoever that is, I want in this courtroom at 9:30 on Monday morning, January 9th. And, the Secretary of Labor I expect to be fully informed. If you need to bring the appellate lawyer, but I want to know what's going on in this matter from someone who knows. I don't think the Court of Appeals dealt with those two issues, Mr. Neely.

MR. NEELY: No, Your Honor. I just reviewed that and those were not issues, the plaintiff's right to privacy and Graham-Leach-Bliley were solely CTC issues.

THE COURT: I didn't think so. I didn't think so, Mr. Neely. But you don't come into Federal Court not knowing that when you know one of the arguments is going to be that this case is on appeal. And, if you read the materials, your know that Mr. Gates' colleague Mr. Peterlin, argued last time, and I accepted it, Judge, wait until the oral argument and the decision in Koresko because he assured me that the Third Circuit was going to deal with these issues. And, I said, are they up there before the Court of Appeals?

And, Mr. Peterlin assured me that he was convinced the Third Circuit was going to deal with them, so I would like to understand what happened there. The Third Circuit, at least as far as I read their decision, did not deal with the issues. To be quite frank, I didn't expect them to because they were not before me. And, this was an amicus brief but Mr. Peterlin felt otherwise, and so I have held back enforcing my order other than what CTC agreed to do. That's what I have limited the contempt for, which I think was a huge agreement by the Court, a generous decision by the Court with respect to CTC.

But now I need lawyers from the Secretary of Labor who know what's going on and who can tell me for absolute sure that there isn't an agreement that things will be held off. And, I need you, Mr. Gates, to bring in the people who decided this thing who can talk to me about mitigation. Why shouldn't I put Susan Russell in prison, incarcerate her? Why shouldn't I have a Marshall here on Monday morning? Be-

lieve me, I mean, I had Marshalls here during the last time I heard the – with respect to Mr. Koresko. You need to understand this is serious. There are U.S. Marshalls who will sit in this courtroom and take her into custody. Do you understand?

MR. GATES: I do, Your Honor. We – the Board of Directors and Sue Russell, we have contemplated this issue strenuously. And, I can only say that Community Trust Company is a fairly new trust company. It's only been around for a few years. It's small. The contempt fines you have imposed have really—have been very burdensome. Were—the Board has considered thoroughly the distinct possibility that the beneficiaries of the real VIVA (phonetic) Trust will, in fact, sue the company under Graham-Leach-Bliley and the right to financial privacy. So we've really weighted these issues very heavily and we think the lawsuit is very real. And, that's why we want the Third Circuit to deal with that issue, tell us once and for all whether it's correct or not and we will comply. But we're not trying to flout the Court's authority.

THE COURT: All right. All right, sir. Well, I think I've heard enough today. Anything further, Mr. Neely?

MR. NEELY: Only to say –

THE COURT: Have I made myself clear? I mean, do you understand where we are?

MR. NEELY: Yes, I understand, Your Honor. And, I just wanted to make it clear though that I have consulted with the appellate counsel and there has been no agreement

to postpone to stay things here at the district court level while these matters are on appeal.

THE COURT: All right. But I need somebody here who can explain to me what is going on in the Court of Appeals. Mr. Gates is saying the Secretary of Labor has now agreed to an expedited hearing. The Court of Appeals, apparently, according to Mr. Gates, denied that earlier. I need to see the orders. I really would like the appellate lawyer here. I want to know what's going on in the appeal, somebody who knows what's going on. I'm not going to incarcerate people on this record that I have so far. I really am not. So I need to understand what is going on, what happened in the other case.

I don't know what happened at oral argument. Was there – did the Court of Appeals say they weren't going to consider the amicus arguments? Where are we on this? Obviously, I don't think these arguments that have been made have any merit, certainly with respect to the order that I gave with respect to what CTC has agreed to. But I would like to understand more what is going on. So I do want the appellate lawyer here who can explain all that to me. I need somebody who had been in the case for a long time. You just go into the case, didn't you?

MR. NEELY: Yes, since Appetta left the office.

THE COURT: Have you read all the transcripts of the earlier hearings in both cases?

MR. NEELY: Yes. I'm more familiar with the CTC matter, but –

THE COURT: Well, you need to get familiar with both of them, sir, because they're related. And, the documents, as I understand it, are the same documents. So to the extent – I don't know what the argument from Mr. Koresko and his client – excuse me, and that entity is as to why they haven't now produced documents. But I'll hear from him on Monday. But to the extent they produce documents, obviously that lessens the need for the Secretary of Labor to have them from CTC. So I think I need somebody who is all up to date on everything, sir. Okay?

Any questions from the Court about where we are and what's at stake and what I expect on Monday morning? Mr Gates?

MR. GATES: I have a copy of the memo from the Clerk of the Third Circuit and the briefing schedule.

THE COURT: Are they extra copies?

MR. GATES: They are my only copy.

THE COURT: Well, then keep them, but I mean, you know, have them – be prepared to give them to me on Monday. If they're your only copies, I don't want to take them from you at this point.

MR. GATES: Okay.

THE COURT: All right. Anything further? All right Then we are adjourned in this matter until Monday morning.

Thank you.

(Court is adjorned)

* * * * * *

CERTIFICATION

I, Diana Doman, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of proceedings in the above-entitled matter.

_____

Diana Doman

Date:

EXHIBIT 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Elaine L. Chao, Secretary of Labor) United States Department of Labor,) Appellee	) Nos. 04-3614,05-1440) 05-1946, & 05-2673
v.	)
John J. Koresko, V, et al Appellants	)

SECRETARY OF LABOR'S OPPOSITION TO EMERGENCY MOTION TO RECALL THE MANDATE AND TO STAY THE MANDATE PENDING PETITION FOR CERTIORARI

Appellee Elaine L. Chao, Secretary of Labor, United States Department of Labor ("Secretary") submits this opposition to the "emergency" motion ("Em. Mot.") of appellants John J. Koresko, V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc., and Koresko and Associates, P.C., to recall and stay the mandate of this Court pending a petition for certiorari in this routine subpoena enforcement action. The district court has scheduled a hearing on the Secretary's motion to incarcerate Koresko for civil contempt on Monday, January 23, 2006.

1. Procedural history. On February 4, 2004, the Secretary served subpoenas duces tecum on appellants in order to conduct an investigation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§1001 et seq. Joint Appendix ("JA") 293a-300a.[6] On August 23, 2004, after two hearings and careful consideration of appellants' privilege claims, the district court ordered appellants to produce the documents by September 20, 2004. JA 19(l)a. Instead of complying with the district court denied their motion for stay pending appeal, and this Court denied a similar motion on December 22, 2004. JA19(2)a, 1093a.

On February 25, 2005, the Secretary filed a motion to incarcerate Koresko for civil contempt. JA 794a-819a. On March 17, 2005, after two hearings, the district court held three of the appellants in civil contempt and imposed a coercive fine, but did not rule on the motion to incarcerate. JA 931a-932a; see JA19(4)a-19(5)a. After an additional round of appeals (Nos. 05-1440, 05-1946, and 05-2673), this Court issued an order on August 15, 2005, staying the contempt proceedings pending a decision on appeal. On October 12, 2005, this Court issued an unreported decision ("Op") affirming the orders of the district court in all respects. On December 20, 2005, this Court denied rehearing and rehearing en banc. Appellants did not move to stay the mandate, which was issued on December 28, 2005.

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[6] "JA" refers to the Joint Appendix filed in this Court by Appellants in Case Nos. 05-1440, 05-1946 and 05-2673, dated August 8, 2005.

On December 30, 2005, the Secretary asked the district court to schedule another hearing on the pending motion to incarcerate Koresko. That motion is scheduled for hearing in the district court on January 23, 2006. See Em. Mot. 1. Appellants then filed this "emergency" motion to recall and stay this Court's mandate.

2. Recall of the mandate. Courts of appeals have "an inherent power to recall their mandates, subject to review for an abuse of discretion." Calderon v. Thompson, 523 U.S. 538, 549 (1998). The power to recall a mandate is "one of last resort, to be held in reserve against grave, unforeseen contingencies," and must be exercised sparingly and only in "extraordinary circumstances." Id. at 550. This Court has identified five situations that might justify recalling its mandate: "(1) where clarification of a mandate and opinion is critical; (2) where misconduct has affected the integrity of the judicial process; (3) where there is a danger of incongruent results in cases pending at the same time;" "(4) where it is necessary to revise and 'unintended' instruction to a trial court that has produced an unjust result;" and (5) where a subsequent Supreme Court decision 'showed that (the) original judgment was demonstrably wrong." Am. Iron & Steel Sinst. v. EPA, 560 F.2d 589, 594 (3d Cir. 1977).

None of the five situations listed in American Iron & Steel is present in this case, and appellants do not suggest that they are. Rather, appellants argue that this case meets the standard set in Calderon because Koresko's risk of imprisonment is an "extraordinary circumstance[] "and a" grave, unforeseen contingency". Em. Mot. 2. Nothing could be further from the truth. Koresko has knowingly incurred a risk of imprison-

ment for civil contempt ever since he defied a court order issued in August of 2004. JA 19(l)a. He has also known at least since February of 2005 that the Secretary sought to jail him if he did not obey the court's orders. JA794a-819a. Thus, his potential imprisonment has been foreseeable for more than a year, and nothing has changed since this Court issued its mandate. In fact, the only extraordinary aspect of this case is how long appellants have avoided the ordinary consequences of their disobedience to lawful court orders.

In Calderon itself, the Supreme Court held that the court of appeals abused its discretion when it recalled a mandate in order to postpone the execution of a death sentence in a criminal case. 523 U.S. at 565-66. If postponing an execution is not adequate grounds to recall a mandate, postponing imprisonment for civil contempt after two years of dilatory litigation does not come to close to meeting the legal standard for such an extraordinary action.

3. Stay of the mandate. Under Rule 41(d)(2), Fed.R.App.P., a party seeking to stay a court of appeals mandate pending a petition for certiorari "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." More specifically, an applicant for a stay pending certiorari must demonstrate a likelihood that the Supreme Court will grant certiorari and reverse the decision of the court of appeals, irreparable injury if the stay is denied, and a balance of the equities favoring interim relief. Rubin v. United States, 524 U.S. 1301, 1301-02 (1998) (Rehnquist, C.J.). Appellants have not established any of these grounds for a stay.

First, it is inconceivable that the Supreme Court would grant a writ of certiorari in this case, much less that it would reverse the decision of this Court, because this case does not present any substantial legal questions. The legal standards for enforcement of administrative subpoenas have been settled for more than half a century. See United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) ("it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant"). The Secretary of Labor has broad subpoena authority under ERISA, 29 U.S.C. §1134, which incorporates by reference the enforcement provisions in the Federal Trade Commission Act, 15 U.S.C. §§ 49, 50.[7] Furthermore, there is

---

[7] ERISA provides, in pertinent part:

> (a) Investigation and submission of reports, books, etc. The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this subchapter or any regulation or order thereunder –
> (1) to make an investigation, and in connection therewith to require the submission of reports, books and records, and the filing of data in support of any information required to be filed with the Secretary under this subchapter, and
> (2) to enter such places, inspect such books and records and question such persons as he may deem necessary to enable him to determine the facts relative to such investigation, if he has reasonable cause to believe there may exist a violation of this subchapter or any rule or regulation issued thereunder of or the entry is pursuant to an agreement the plan.

no conflict in the circuits regarding the standards for enforcing administrative subpoenas under ERISA. See Donovan v. Shaw, 668 F.2d 985, 989 (8th Cir. 1982) ("[i]t is well-settled that a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statue"). Accordingly, this case does not satisfy any of the criteria for review on certiorari listed in Supreme Court Rule 10.

Appellants claim that this case presents two questions worthy of Supreme Court review. First, they contend, erroneously, that there is a split in the circuits on whether "jurisdiction is an element of an administrative agency's prima facie case" to enforce an administrative subpoena. Em. Mot. 5. Appellants are incorrect. There is no split in the circuits on the general legal standards for enforcement of investigative subpoenas by federal agencies, or on the standards that apply under ERISA. Rather, variations in the outcome of subpoenas enforcement cases are explained by two factors:

....

(c) Other provisions applicable relating to attendance of witness and production of books, records, etc.

For the purpose of any investigation provided for in this subchapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses, and the production of books, records, and documents) are hereby made applicable (without regard to any limitation in such sections respecting persons, partnerships, banks or common carriers) to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

29 U.S.C. §1134(a), (c)

(1) differences in the wording of the statutes authorizing agency investigations; and (2) whether a subpoena enforcement case presents purely legal questions that a court can resolve before allowing an agency investigation to proceed.

For example, as this Court recognized in its opinion in this case, some statutes contain prerequisites to agency investigations that do not exist in ERISA. Op. 7-8; EEOC v. Shell Oil Co., 466 U.S. 54, 65 (1984) (Title VII requires a charge of discrimination as a prerequisite to judicial enforcement of an EEOC subpoena); Fed. Election Comm'n v. Machinists Non-Partisan Political League, 655 F.2d 380, 387-88 & n.14 (D.C. Cir. 1981) (FEC Act requires a signed, sworn, notarized complaint as a prerequisite to an FEC subpoena). Indeed, both of those cases (relied on by appellants) expressly distinguish the broader subpoena authority contained in the Federal Trade Commission Act, which is incorporated by reference into ERISA. Shell Oil, 466 U.S. at 64-65; Machinists, 655 F.2d at 387-88; 29 U.S.C. §1134 (c).

Similarly, on occasion a subpoena enforcement case presents a dispositive coverage question that can be decided as a matter of law without an investigation by the agency. See, e.g. EEOC v. Krauk Tribe Housing Auth., 260 F.3d 1071 (9th Cir. 2001) (whether the Fair Labor Standards Act applies to a tribal employer). But those cases are narrow exceptions to the well-established rule that "courts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law." Krauk Tribe., 260 F.3d at 1076 (citing Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943), and other Supreme Court cases). As this Court correctly held,

under ERISA the general rule applies, not the exception. Op.7-8 (citing Donovan v. Shaw, supra.)

Appellants also argue that this case presents a legal question under the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. §§ 6801 et. seq. Em. Mot. 5 Appellants again are incorrect. Appellants' opening brief to this Court in the subpoena enforcement appeal (No. 04-3614) did not raise any questions under GBLA, and this Court did not decide any such questions. Thus, while the GBLA is at issue in two related cases before this Court involving a subpoena to a financial institution, Cha v. Community Trust Co., Nos. 05-2785 and 05-4828, appellants have not preserved any arguments based on the GLBA in the Koresko appeals.

Aside from their failure to demonstrate any likelihood of success on the merits, appellants have also failed to establish any of the traditional equitable factors supporting a stay. Certainly incarceration for civil contempt is not an irreparable injury, as the contemnor "carries the keys of his prison in his own pocket." Int'l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 828 (1994) (internal quotation marks and citation omitted). Nor would the production of the subpoenaed documents produce irreparable injury by mooting a subsequent petition for certiorari, as appellants contend. Em. Mot. 1-2. The production of documents pending appeal on subpoena enforcement does not moot the appeal, because there is still some relief the Court could offer such as requiring the destruction or return of the produced documents. Church of Scientology v. United States, 506 U.S. 9, 12-13 (1992); see also Rubin, 524 U.S. at 1301-02 (denying motion for stay of subpoenas; no irreparable harm established de-

spite movant's claim that privileged material would be disclosed absent a stay).

Finally, the balance of the equities does not favor any further stays in this litigation, which has already been protracted for almost two years, at a tremendous waste of government and judicial resources, as well as the possible prejudice of the interests of plan participants and beneficiaries that ERISA was enacted to protect. See 29 U.S.C. § 1113 (ERISA statute of limitations). Appellants argue that, to avoid Koresko's incarceration, they will be "forced to sacrifice the appellate rights the[y] enjoy as a matter of right under the Federal Rules of Civil Procedure and Appellate Procedure." Em. Mot. 6. That argument is frivolous. Appellants have already exhausted all their appellate rights – in district court, before a panel of this Court, and before this Court en banc. "Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. There is no basis for this Court to recall or stay its mandate and postpone the Secretary's investigation by another six months until the Supreme Court denies appellants' petition for certiorari.

Conclusion. The emergency motion to recall the mandate and to stay the mandate pending petition for certiorari should be denied.

Respectfully submitted,

Howard M. Radely
Solicitor of Labor

Timothy D. Hauser

Associate Solicitor

Karen L. Handorf
Counsel for Appellate
and Special Litigation

ELLEN L. BEARD
Senior Appellate Attorney

Office of the Solicitor
Plan Benefits Security Division
U.S. Department of Labor
Rm. N-4611
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5767

January 2006

CERTIFICATE OF SERVICE

I hereby certify that copies of the Secretary of Labor's Opposition to Emergency Motion to Recall the Mandate and to Stay the Mandate Pending Petition for Certiorari were served on January 12, 2006, by facsimile and by first-class mail, postage pre-paid, on the following counsel of record:

Mark E. Gottlieb, Esq.
Robert E. Frankel, Esq.
William H. Pillsbury, Esq.
Anderson Kill & Olick, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
Fax: 215-568-4573

_____

Ellen L. Beard
Senior Appellate Attorney

VERIFICATION

I, JOHN J. KORESKO, V., hereby verify that I am a Petitioner in the foregoing petition and that the factual allegations in the foregoing are, to the best of my knowledge, information and belief, true and correct. I understand that false statements made herein are subject to the penalties set forth in 18 U.S.C. § 1623, and 18 Pa.C.S.A. § 4904.

Dated: January 17, 2006 Respectfully submitted,

_____

John J. Koresko, V

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. _____

In re JOHN J. KORESKO, V, Esquire

JOHN J. KORESKO, V, Esquire
REGIONAL EMPLOYERS' ASSURANCE LEAGUES, DELAWARE VALLEY LEAGUE, PENN-MONT BENEFIT SERVICES, INC. and KORESKO & ASSOCIATES, P.C.

Petitioners

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Respondent

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Emergency Petition for Writs of Mandamus, Prohibition and Other Equitable Relief to Prohibit Further Contempt Proceedings in the United States District Court for the Eastern District of Pennsylvania in the Matter Docketed at No. 04-MC-0074 and Petition for Contempt of the Order of the Hon. Edward Becker and Michael Fisher, JJ.

was served on the following parties BY HAND THIS DATE and by facsimile and overnight mail, handling prepaid.

Opposing Counsel: Donald K. Neely, Esquire
US Department of Labor
Phila Regional Office
The Curtis Center – Suite 630E
170 S. Independence Mall W
Philadelphia, PA 19106-3306

Courtesy Copy: The Hon. Mary A. Mclaughlin
United States District Court
Eastern District of PA
U.S. Courthouse
601 Market Street
Room 13614
Philadelphia, PA 19106

Respectfully submitted:

January 19, 2006 Jeanne Bonney, Esq.

APPENDIX E – DOCKET OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT

General Docket
US Court of Appeals for the Third Circuit

Court of Appeals Docket #: 04-3614 Filed 9/13/04
Nsuit: 1890 Other Statutory Actions
Secretary Labor v. Koresko, et al
Appeal from: Eastern District of Pennsylvania

Lower court information:
District : 0313-2:04-mc-00074
Trial Judge: Mary A. McLaughlin, District Judge
Date Filed: 4/19/04
Date order/judgment: 8/3/04
Date NOA filed: 9/8/04

Fee Status: paid

Prior cases:
None
Current cases:

Lead	Member	Start	End
Related:			
04-3614	05-1440	2/15/05	12/28/05
04-3614	05-1946	3/29/05	12/28/05
04-3614	05-2673	6/1/05	12/28/05
05-1440	05-2673	6/1/05	12/28/05
05-1946	05-2673	6/1/05	12/28/05
joined:			
05-1440	05-1946	5/11/05	12/28/05

04-3614 Secretary Labor v. Koresko, et al

Secretary Labor Appellee	Gail Perry FAX 202-693-5610 202-693-5600 ext5595 [COR NTC gvt] United States Department of Labor Plan Benefits Security Division P.O. Box 1914 Washington, DC 20013
v.	
John J. Koresko Appellant	Virginia L. Miller FAX 215-568-4573 215-568-4202 [COR NTC ret] Anderson, Kill & Olick 1600 Market Street Suite 2500 Philadelphia, PA 19103
V. Regional Employers' Assurance Leagues Appellant	Virginia L. Miller (See above) [COR NTC ret]

De Valley League Appellant	Virginia L. Miller (See above) [COR NTC ret]
Penn-Mont Benefit Appellant	Virginia L. Miller (See above) [COR NTC ret]
Koresko Assoc. Appellant	Virginia L. Miller (See above) [COR NTC ret]

Comm Trust Co
Amicus-appellant

Docket as of January 13, 2006 6:03 pm Page 2

04-3614 Secretary Labor v. Koresko, et al

Secretary Labor
Appellee

v.

John J. Koresko; V. Regional Employers' Assurance Leagues; De Valley League; Penn-Mont Benefit; Koresko Assoc.
Appellants

Comm Trust Co
Amicus-appellant

04-3614 Secretary Labor v. Koresko, et al

9/13/04 Civil Case Docketed. Notice filed by John J. Koresko, V. Regional Empl, De Valley League, Penn-Mont Benefit, Koresko Assoc. (crg) [04-3614]

9/22/04 Appearance from Attorney Gail Perry on behalf of Appellee Secretary Labor, filed. (crg) [04-3614]

9/23/04 Appearance from Attorney Virginia L. Miller on behalf of Appellants John J. Koresko, V. Regional Empl, DE Valley League, Penn-Mont Benefit and Koresko Assoc., filed. (crg) [04-3614]

9/23/04 Disclosure Statement on behalf of Appellants John J. Koresko, V. Regional Empl and DE Valley League, Penn-Mont Benefit and Koresko Assoc, filed. (crg) [04-3614]

9/23/04 Information Statement on behalf of Appellants John J. Koresko, V. Regional Empl, DE Valley League, Penn-Mont Benefit and Koresko Assoc, received. (crg) [04-3614]

9/23/04 Concise Summary of Case on behalf of Appellants John J. Koresko, V. Regional Empl, DE Valley League, Penn-Mont Benefit and Koresko Assoc, received. (crg) [04-3614]

10/4/04 Transcript Purchase Order (Part I), already on file in the District Court Clerk's Office, filed. (crg) [04-3614]

10/26/04 Certified List filed. (crg) [04-3614]

10/26/04 Briefing Notice Issued. Appellant brief and appendix due 12/6/04. (crg) [04-3614]

11/12/04 Motion by Appellants to stay district court order pending appeal together with Volumes I and II of appendix and memorandum of law, filed. Answer due 12/06/04. Certificate of Service dated 11/18/04. (crg) [04-3614]

11/17/04 Motion by Appellee for extension of time to file brief until 2/7/05 filed. Answer due 12/02/04. Certificate of Service dated 11/16/04. (crg) [04-3614]

11/18/04 Amended Certification of Service by appellant for Motion to stay pending appeal, filed (crg) [04-3614]

11/22/04 Order (Clerk) granting motion by appellees for extension of time to file brief. Appellee's brief shall be filed and served on or before February 7, 2005, filed. (crg) [04-3614]

12/1/04 Appellants verbally granted an extension of time until 12/20/04 to filed brief and appendix pursuant to LAR 31.4 (nmb) [04-3614]

04-3614 Secretary Labor v. Koresko, et al

12/1/04 Letter from Appellants confirming extension of time pursuant to LAR 31.4 with service on opposing counsel. Service date 12/1/04. (nmb) [04-3614]

12/6/04 Response filed by Appellee Secretary Labor in opposition to motion to stay district court order pending appeal. Certificate of Service dated 12/3/04. (crg) [04-3614]

12/20/04 Brief/Appendix on behalf of Appellant John J. Koresko, Appellant V. Regional Empl, Appellant DE Valley League, Appellant Penn-Mont Benefit, Appellant Koresko Assoc, Copies: 10, Pages: 66, Word Count: 13,931, delivered by mail, filed. Certificate of service date 12/20/04. (lal) [04-3614]

12/20/04 Appendix with volume 1 attached to brief on behalf of Appellants John J. Koresko, V. Regional Empl, DE Valley League, Penn-Mont Benefit and Koresko Assoc. Copies: 4 Volumes: 5, Delivered by mail, filed. Certificate of service dated 12/20/04. (lal) [04-3614]

12/22/04 Order (Rendell, Authoring Judge and Fisher, Circuit Judges) denying Motion by Appellants to Stay D.C. Order Pending Appeal Together with Volumes I & II of Appendix and Memorandum of Law, filed. B-13 (clw) [04-3614]

12/22/04 Certified copy of order Lower Court. (clw) [04-3614]

1/5/05 Appellants' "Petition for Rehearing and Rehearing En Banc" forwarded to the Panel Pursuant to IOP 10.3.3 or in the alternative for reconsideration of the Court's December 22, 2004 Order, filed. Answer due 1/21/05. Certificate of Service dated 1/5/05. (dmm) [04-3614]

1/7/05 Motion by Proposed Amicus-Appellant CommTrust Co. for leave to proceed as amicus curaie and to file brief out of time, filed. Answer due 1/24/05. Certificate of service dated 1/6/05 (gpk) [04-3614]

1/24/05 Order (Rendell, Authoring Judge and Fisher, Circuit Judges) denying motion for reconsideration of the Court's Order dated 12/22/04 by Appellants, filed. (ch) [04-3614]

2/7/05 Order (Fuentes, Authoring Circuit Judge) granting motion by Proposed Amicus-Appellant Comm Trust Co. for leave to proceed as amicus curiae and for leave to file brief out of time, filed. A-37 (gpk) [04-3614]

2/7/05 Amicus Brief on behalf of Amicus-Appellant Comm Trust Co. Copies: 10, Pages: 15, Word Count: 2,415, delivered by mail, filed. Certificate of service date 1/14/05. (gpk) [04-3614]

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04-3614 Secretary Labor v. Koresko, et al

2/7/05 Brief on behalf of Appellee Secretary Labor. Copies: 10, Pages 39, Word Count: 8,968, Delivered by mail, filed. Certificate of service dated 2/7/05. (gas) [04-3614]

2/17/05 Appellants verbally granted an extension of time until 3/10/05 to file reply brief pursuant to LAR 31.4 (nmb) [04-3614]

2/17/05 Letter from Appellants confirming extension of time pursuant to LAR 31.4 with service on opposing counsel. Service Date 2/17/05. (nmb) [04-3614]

3/10/05 Reply Brief on behalf of Appellants in 04-3614. Copies: 10. Delivered by mail, filed. Certificate of service date 3/10/05. (gpk) [04-3614]

3/10/05 Supplemental Appendix attached to Reply Brief on behalf of Appellants in 04-3614. Volumes: 1, Delivered by mail, filed. Certificate of service date 3/10/05. (gpk) [04-3614]

3/11/05 Notice of telephone request to Virginia I. Miller, counsel for Appellants, for motion to file supplemental appendix attached to reply brief. Response due in 3 days. (gpk) [04-3614]

3/21/05 2nd Notice of telephone request to Virginia I. Miller, counsel for Appellants, for motion to file supplemental appendix attached to reply brief. Response due in 3 days. (gpk) [04-3614]

3/23/05 Compliance Received. Appellants' motion, received. (gpk) [04-3614]

3/23/05 Motion by Appellants in 04-3614 to file supplemental appendix attached to reply brief, filed. Answer due 4/7/05. Certificate of Service dated 3/23/05. (gpk) [04-3614]

3/30/05 Order (Clerk) construing motion by Appellants to file supplemental appendix as motion for leave to file the supplemental appendix attached to reply brief, which was filed on March 10, 2005. So construed, the motion is granted with filing of the supplemental appendix as of March 10, 2005, filed. (gpk) [04-3614]

7/18/05 Motion by Appellants to expedite appeal, filed. Answer due 08/01/05. Certificate of Service dated 7/18/05. (crg) [04-3614]

7/29/05 Response filed by Appellee to motion to expedite appeal Certificate of Service dated 7/28/05. (crg) [04-3614]

7/29/05 Order (Fuentes, Circuit Judge) granting motion by appellant to expedite appeal, filed. A-136-E. (crg) [04-3614].

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04-3614 Secretary Labor v. Koresko, et al

8/1/05 Calendared for Thursday, September 29, 2005. (mac) [04-3614]

9/29/05 Argued Thursday, September 29, 2005 Panel: Rendell, Fuentes, and Weis, Circuit Judges. Counsel for Appellants: Virginia L. Miller and Counsel for Appellee: Gail A. Perry. (clr) [04-3614 05-1440 05-1946 05-2673]

10/12/05 Not Precedental Opinion (Rendell, Authoring Judge, Fuentes, and Weis, Circuit Judges), filed. Total pages: 18. (crg) [04-3614 05-1440 05-1946 05-2673]

10/12/05 Judgment, Affirmed. All of the above in accordance with the opinion of this Court. Costs taxed against the Appellants, filed. (crg) [04-3614 05-1440 05-1946 05-2673]

10/26/05 Bill of Costs by Appellee Secretary Labor, filed. Certificate of Service dated 10/25/05. (crg) [04-3614 05-1440 05-1946 05-2673]

10/26/05 Petition by Appellants for rehearing en banc, filed. Certificate of service dated 10/26/05. (crg) [04-3614 05-1440 05-1946 05-2673]

10/27/05 Motion by Appellants for leave to submit corrected version of request for panel and en banc rehearing, filed. Answer due 11/14/05. Certificate of Service dated 10/27/05. (crg) [04-3614 05-1440 05-1946 05-2673]

11/2/05 Order (Rendell, Circuit Judge) granting motion by Appellants for leave to submit corrected version of petition for panel and en banc rehearing, filed. (crg) [04-3614 05-1440 05-1946 05-2673]

11/2/05 Amended Petition by Appellants for rehearing en banc, filed. Certificate of service dated 10/27/05. (crg) [04-3614 05-1440 05-1946 05-2673]

12/20/05 Order (Scirica, Chief Judge, Sloviter, Alito, Roth, McKee, Rendell, Authoring Judge, Barry, Ambro, Fuentes, Smith, Fisher, Van Antwerpen, and *Weis, Circuit Judges) denying petition for en banc rehearing by Appellant, filed. *Honorable Joseph F. Weis, Jr., Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel rehearing. (crg) [04-3614 05-1440 05-1946 05-2673]

12/28/05 Mandate Issued, filed. (05-2673 05-1946 05-1440) (05-2673 05-1946) (05-2673) (crg) [04-3614 05-1440 05-1946 05-2673]

12/28/05 Record released. (crg) [04-3614 05-1440 05-1946 05-2673]

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04-3614 Secretary Labor v. Koresko, et al

1/9/06 Motion by Appellant to recall mandate and to stay mandate pending petition for certiorari, filed. Certificate of Services dated 1/9/06. (crg) [04-3614]

1/12/06 Response filed by Appellee Secretary Labor in opposition to motion to recall mandate and to stay mandate. Certificate of Service dated 1/12/06. (crg) [04-3614]

Docket as of January 13, 2006 6:30 pm Page 8

APPENDIX F – NOTICE OF APPEAL FROM THE DISTRICT COURT, DATED SEPTEMBER 9, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Case No.: 04:MC:00074(MAM)

ELAINE CHAO, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,

Petitioner,

-vs.-

JOHN J. KORESKO, V; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC.; and KORESKO & ASSOCIATES, P.C.;

Respondents.

NOTICE OF APPEAL

Notice is hereby given that Respondents, John J. Kresko, V, Regional Employers' Assurance Leagues, Delaware Valley League, Penn-Mont Benefit Services, Inc. and Koresko & Associates, P.C., hereby appeal to the United States Court of Appeals for the Third Circuit from the Memorandum and Order entered on May 11, 2004 (Exhibit "A") and the Memorandum and Order entered on August 3, 2004 (Exhibit "B") and the Order entered on August 23, 2000 (Exhibit "C') in this action.

Respectfully submitted,

Dated: September 8, 2004

Virginia I. Miller
I.D. No. 85361)
ANDERSON KILL & OLICK, P.C.
1600 Market Street
Suite 2500
Philadelphia, PA 19103
Telephone: 215-568-4202

APPENDIX G – ORDER OF THE DISTRICT COURT, DATED AUGUST 23, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	:	
Petitioner	:	
v.	:	
JOHN KORESKO, et al.	:	
Respondents	:	No. 04-MC-74

MEMORANDUM AND ORDER

McLaughlin, J. August 2, 2004

On May 11, 2004, the Court issued a decision, rejecting the respondents' general challenge to the enforceability of subpoenas duces tecum issued by the Secretary of Labor pursuant to § 504 of the Employee Retirement Home Security Act ("ERISA"), 29 U.S.C. § 1134. The Court did not decide the respondents' specific objections to the subpoenas that were based on claims of privilege. The Court ordered the

parties to try to resolve the specific objections to the subpoenas by June 1, 2004. The parties did not do so.

The Court held a hearing on the specific objections on June 16, 2004. After the hearing, counsel for the parties spent several hours trying to resolve the remaining objections. The Court then met with counsel in chambers for a substantial amount of time to try to understand the respondents' objections and to see if it could assist the parties in negotiating a settlement of the dispute. The Court was unsuccessful. The Court ordered the respondents to provide the Court with a privilege log and any argument with respect to privilege. The respondents responded on July 9, 2004. The petitioner filed an opposition to the respondents' privilege arguments on July 19, 2004.

The respondents submitted a large binder with a table of contents on the outside. Exhibit A consists of the respondents' general objections most of which have already been overruled by the Court's May 11 decision. There follows a "statement of privileges" that appears to be a non-paginated discussion of various privileges. It is not signed by anyone. There follow copies of three cases, two Department of Labor Advisory Opinions, and certain Pennsylvania Rules of Disciplinary Enforcement. Tab 8 to Exhibit A appears to be a copy of the subpoena with notations next to each request, such as "P=privilege asserted and set forth herein."

Exhibit B in the binder consists of the privilege log and 30 tabbed documents. The privilege log consists of four pages listing 30 types of documents. The following privileges are apparently asserted with respect to each document: attorney client privilege; attorney work product; identity privilege;

7525 communication; and accountant/client privilege. There is a description of the subject matter of each category of document. The 30 documents that follow appear to be samples of the categories of documents the respondents want to withhold as privileged. Some of the documents have been redacted.

Two of the five privileges asserted by the respondents are inapplicable: privilege under 26 U.S.C. § 7525; and accountant/client privilege. The tax practitioner privilege under § 7525 of the Internal Revenue Code may only be asserted in either a noncriminal tax matter before the Internal Revenue Service or a noncriminal tax proceeding in Federal Court brought by or against the United States. 26 U.S.C. § 7525 (a) (2). This case is an action to enforce administrative subpoenas under the Employee Retirement Income Security Act (herinafter "ERISA"), not a tax proceeding.

The state law accountant-client privilege also does not apply here. Only federal privileges apply to claims arising out of federal law. Pearson v. Miller, 211 F.3d 57, 66 (3d Cir. 2000). Because federal law applies in proceedings to enforce administrative subpoenas, only federal privileges are relevant. See, e.g., NLRB v. N. Bay Plumbing, Inc., 102 F.3d 1005, 1009 (9th Cir. 1996) (finding state-law privilege irrelevant in an agency subpoena enforcement case). Federal law does not recognize an accountant-client privilege. See United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984).

As to the other three privileges, the respondents have not supported their claims with the kind of specific information that is required. The Court cannot tell what documents the

respondents claim are protected by what privilege[s], by whom the document was prepared, from whom and to whom it was sent, and why it is a privileged communication.

The Court has considered ordering the respondents to try again to prepare an adequate privilege log. But the Court concludes that the respondents have been given more than enough time to support their claim that they should not be ordered to produce documents in response to these subpoenas. The subpoenas were issued on January 28, 2004. The subpoenas were issued on January 28, 2004. The petitioner tried over the next several months to negotiate with the respondents. On April 19, 2004 the petitioner filed her motion to enforce the subpoenas. This Court had a hearing on May 10, 2004, issued its decision on the general objections on May 11, 2004, had another hearing on June 16, 2004, ordered the parties to negotiate the dispute, and met with counsel again in chambers. The respondents were not able orally to state with any precision why any of the documents are privileged. The Court gave the respondents another chance to do it in writing but that too has proved futile.

The Court has spent hours trying to understand the nature of the respondents' claims of privilege. The petitioner's response was not very helpful. The petitioner submitted a general response to the privilege log, arguing that it was inadequate as support for the claims of privilege. The Court understands the petitioner's frustration; but, the Court cannot reject claims of privilege without an analysis of the respondents' arguments. That is why the Court has spent so much time with this binder. What follows is the Court's decision with respect to many categories. With respect to other cate

gories, the Court asks the petitioner to answer certain questions.

The 30 types of documents claimed to be privileged fall into the following categories:

1. Transaction documents, such as plan documents, summary plan descriptions, beneficiary nomination forms, etc. (Tabs 1, 2, 4, 5, 6, 7, 8, 10, 12, 22, 23, 24, and 25). The Court can see no possible privileges to these documents. They are transaction documents that relate to various benefit plans. In any event, the respondents have now given them to the petitioner so any privilege has been waived. Apparently, the respondents claim privilege in connection with the names that have been redacted from a few of the documents. This is apparently where the so-called "identity" privilege comes in. The respondents appear to argue that now that they have given the substance of the documents to the petitioner, they are entitled to conceal the names of participants in the various plans because to give the names would reveal privileged information. The Court rejects this argument as to the transaction documents described above. They were never privileged from the beginning.

2. Retention letter from Koresko and Associates related to its representation of someone in connection with an IRS request for information about a certain tax return. (Tab 3). The names of the persons involved have been redacted. This retention letter is apparently a form letter sent by Koresko and Associates to persons seeking their help in connection with an IRS request such as the one included behind tab 3. A retention letter from a lawyer is usually not privileged. But it may be that the petitioner does not want these kinds of

documents. The petitioner shall explain to the Court its position with respect to documents of this type.

3. Letters from Penn-Mont to various participants in plans advising them of certain compliance requirements. (Tabs 9 and 11). Again, names of the participants are redacted. The respondents have given over the substance of the documents and now argue that to give the names of the recipients would breach the privilege. Although the Court does not know what privilege is being asserted because Penn-Mont is not a lawyer, the petitioner should explain its position on any privilege relating to these type documents.

4. Census data forms. (Tabs 13 and 21). These are not privileged but does the petitioner want these forms?

5. Various insurance forms. (Tabs 18, 19, and 20). The Court assumes that these are the documents that the respondents claim are private medical documents. Does the petitioner want these documents?

6. Various documents that relate to the day to day activity of the benefit plans, such as blank benefit forms, wire transfer requests, cancelled checks, bank statements, premium amounts, etc. (Tabs 14, 15, 16, 17, 26, 27, and 29). These do not appear to be privileged, but does the petitioner even want them?

7. Letters from Koresko & Associates to third parties making various demands on behalf of the Real VEBA. (Tab 28). A letter from a lawyer to a third party is not privileged; but does the petitioner want these types of documents?

8. Tab 30 is a copy of a bill from Anderson Kill & Olick, P.C. Law firm bills can usually be redacted any privileged information; but the Court understood that the petitioner did not want law firm bills from Anderson Kill & Olick, P.C. Is that correct?

At this time, the Court does not see any category of documents that is privileged; but the Court instructs the petitioner to answer the questions listed in this memorandum. The respondents may reply briefly.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	:	
Petitioner	:	
v.	:	
JOHN KORESKO, et al.	:	
Respondents	:	No. 04-MC-74

ORDER

AND NOW, this 27th day of July, 2004, following a hearing in the above captioned case on June 16, 2004, and upon consideration of the Petition to Enforce Administrative Subpoenas (Docket No. 1), the responses thereto, the Respondents' Privilege Log (Docket No. 36), and the responses thereto, IT IS HEREBY ORDERED that the petitioner shall respond to the questions raised in a memorandum of today's date by August 10, 2004. The respondents may reply by August 17, 2004.

BY THE COURT:

_____

MARY A. McLAUGHLIN, J.

APPENDIX H – SUPPLEMENTAL RESPONSE, DATED JUNE 16, 2004

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Elaine Chao, Secretary of
Labor, U.S. Department of Labor,
Petitioner, Case No.: 04: MC:00074 (MAM)

-vs.-
John J. Koresko, V;
Regional Employers' Assurance
Leagues;Delaware Valley League;
Penn-Mont Benefit Services, Inc.;
And Koresko & Associates;
Respondents.

LAWYER RESPONDENTS'[1] AND ADMINISTRATIVE RESPONDENTS'[2] SUPPLEMENTAL MEMORANDUM OF LAW IN RESPONSE TO THE DEPARTMENT OF LABOR'S PETITION TO ENFORCE ADMINSTRATIVE SUBPOENA IN AN INVESTIGATION/ADVERSARY PROCEEDING TO JOHN J. KORESKO, V, ESQUIRE; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; DELAWARE

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[1] John J. Koresko, V ("Attorney Koresko"); Koresko & Associates, P.C. ("Kapc") (collectively "Lawyer Respondents")

[2] Pennmont Benefit Services, Inc. ("Penn-Mont"); Regional Employers' Assurance Leagues and Delaware Valley League ("DVL") (collectively "Administrative Respondents")

VALLEY LEAGUE; PENN-MONT BENEFIT SERVICES, INC; and THE LAW FIRM OF KORESKO & ASSOCIATES, P.C.

I. INTRODUCTION

The Respondents file this short supplemental brief to address certain issues raised by the DOL in their supplemental brief. The DOL argues that Respondents have waived their privileges issues as Respondents have not produced a privilege log. Such a result is absurd. Unlike the cases cited by the DOL, Respondents have adequately raised the privilege issues to this Court in various memos and affidavits. Further Respondents have filed an appeal and a memorandum requesting this Court to certify this matter for appeal.

II. ADDITIONAL FACTS

Respondents have been willing to cooperate to a degree in this matter. The DOL has met this cooperation with the following response to Respondents' offer to work out certain privilege issues: "**Additionally, your offer of less than full compliance is not acceptable.**" (Second Aff. Miller, Ex. "A"). Even in light of this attitude, Respondents provided additional documents to the DOL. (Third Miller Aff.). The produced documents" include the DVL VEBA plan documents, REAL VEBA plan documents, DVL VEBA trust documents, REAL VEBA trust documents, and other relevant communications for the Respondents. (Id.). Regarding document requests from the DOL, the Respondents have not provided a privilege log as the Respondents are awaiting the DOL to review thousands of pages of documents that are present at this law firm offices. (Id.). In view of the various motions filed with this court and letter sent to the DOL's at-

torneys, the DOL was aware of the privileges issues and refused to even address any privilege issues by stating that the were entitled to all information. (Id.). After receipt of the second set of PRODUCED DOCUMENTS, the DOL did not contact the RESPONDENTS to view other documents at this law firm's offices, to meet and confer about further documents needed, or to discuss privilege issues. Although Respondents do not agree that the subpoenas are enforceable, Respondents have provided an example of their response to the subpoenas. (Id., Ex. "B"). Regarding the privilege issues, Respondents have raised these issues in briefs filed with this Court and argument. (Id.). These areas generally include: attorney-client privilege, HIPPA and FTC privacy rules, personal privacy issues, and work product. (Id.). The DOL has refused the Respondents' offer to provide further documents redacted. (Id.). Respondents and I have contacted certain representatives and members of REAL. These representatives and members do not wish their financial information, identity information, their medical information, and/or any other information to be provided to the DOL. (Id.). Respondents offered to cooperate to some extent. The DOL has met their cooperation with a refusal for anything short of "full compliance". (Id.).

III. ARGUMENT

The DOL is certainly on notice of the privilege issues. (Miller Affs., Koresko Aff.). Less than a year ago, the Respondents informally responded to these same requests and raised the privilege issues. (Koresko Aff.) The difference now is that the DOL has issued a subpoena. The DOL's assertation that absent a privilege log they cannot ascertain the nature of the privilege is insincere. Further the DOL has re

fused to view documents provided by Respondents at their attorneys' offices. (Second Aff. Miller).

To remind this Court as stated in their prior filing:

> "1) The DOL subpoenas address the Delaware Valley League and the Regional Employers' Assurance League. Neither of these constitutes a welfare benefit plan or trust. Nor are they subject to ERISA. These entities are unincorporated associations of employers who came together to participate in a program of benefits offered to their employees in cooperation with their association. DOL's petition should be denied outright for this technical violation, as DOL is without authority to investigate either League. As DOL may assert that it intended to serve a benefits plan and trust, we submit the remainder of this response. However, on the basis of this technical blunder alone, the instant petition should be denied for failure to name a proper party and DOL's error in acting outside the scope of its investigatory authority; 2) on their face exceed the DOL's jurisdiction and statutory authority; 3) contain broad requests for irrelevant and/or privileged documents, such as all documents concerning life insurance policies, which include personal applications containing the most sensitive of health information and disclosures of diseases, alcoholism, herpes, HIV status, and treatment/hospitalization for such things as mental/emotional disorders; and 4) are directed to the welfare benefit plans' and trusts' attorneys, include

> ing litigation files and client files, that the IRS could not compel.

Respondents' Brief at p. 1-3.

This Court must review the totality of the circumstances presented and not permit the process to be abused. *S.E.C. v. Wheeling-Pittsburgh Steel Corp.*, 648 F. 2d 118, 124 (3d Cir. 1981). The DOL argues that it cannot make any determination about coverage until it has examined, not just the plan and trust documents of the plans, but an almost limitless range of items, including but not limited to all documents identifying the employers and the employee participants; all the underlying insurance policies and all documents relating to the insurance policies; all documents relating to sales, marketing, advertising, and promotion of the plans and underlying policies; all the underlying financial records, including the complete bank records; all documents regarding premiums paid regarding the underlying life insurance policies; all records of any expense of the plans and trusts, and any and all correspondence concerning the above. (See Bindu Decl.; Miller Aff.).

In proceeding to enforce administrative subpoenas duces tecum, the district court may impose reasonable conditions and restrictions with respect to the production of the subpoenated material if the demand is unduly burdensome. *F.T.C v. Texaco, Inc.*, 555 F. 2d 862 (D.C. Cir. 1977). The court must determine whether information sought in a subpoena issued by the agency, pursuant to its general investigatory powers is reasonable, relevant and not overly broad. *E.E.O.C. v. Gladieux Refinery, Inc.*, 631 F. Supp. 927 (N.D. Ind. 1986).

The Supreme Court has said, with regard to an IRS summons, that the witness may challenge the summons "on any appropriate ground." *Reisman v. Caplin*, 375 U.S. 440, 449 (1964); *United States v. Powell*, 379 U.S. 48, 58 (1964). "An administrative agency is not automatically entitled to obtain all material that may in some way be relevant to a proper investigation. Rather... the agency must make some showing of need for the material sought beyond its mere relevance to a proper investigation." Federal Election *Comm'n v. Larouche Campaign*, 817 F. 2d 234 (2d Cir. 1987) (per curiam). The Court must review the totality of the circumstances presented. *S.E.C. v. Wheeling-Pittsburgh Steel Corp.*, 648 F. 2d 118, 124 (3d Cir. 1981). When personal documents of individual are the subject of an administrative subpoena, privacy concerns must be considered. *See Whalen v. Roe*, 429 U.S. 589, 599 (1977). Thus, in *United States v. Westinghouse Electric Corp.*, 638 F. 2d 570, 578 (3d Cir. 1980), where a governmental agency sought production of employee medical records, the Court listed as relevant factors such matters as the type of record requested, the information that it might contain, the potential for harm and subsequent nonconsensual disclosure, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, the specificity of the agency's statutory mandate, and the presence of recognizable public interests justifying access. *See also In re McVane*, 44 F.3d 1127, 1137 (2d Cir. 1995) (agency subpoenas directed at individuals do implicate privacy rights); *Resolution Trust Corp. v. Walde*, 18F.3d 943, 948 (D.C. Cir. 1994) (same).

The Respondents raised these issues in their initial brief to this Court. Here the DOL's subpoenas contain broad re-

quests for irrelevant and/or privileged documents, such as all documents concerning life insurance policies, which include personal applications containing the most sensitive of health information, e.g. disclosures of diseases, alcoholism, herpes, HIV status, and treatment/hospitalization for mental/emotional disorders.

Furthermore, the DOL Requests the contents of the legal files and on-going litigation files of REAL –and further even goes to the length of asking for these files from the plan and trust's counsel, Attorney Koresko. The Third Circuit has made it clear that such information is covered by the attorney-client privilege and is not subject to disclosure. *United States v. Liebman*, 742 F.2d 807 (1984) (attorney not required to turn over identities of clients and other information to IRS as part of investigation of tax-motivated transaction).[3]

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[3] In *Liebman*, IRS attempted to compel the names of a tax lawyer's clients. The Third Circuit held that disclosure of names would be tantamount to disclosing client confidences. IRS could not get the information. The present case involves section 419A(f)(6) arrangements, which IRS has been litigating since before its announcement of intent to litigate in Notice 95-34 1995-1 C.B. 309; 1995-23 I.R.B. 109 (June 5, 1995). DOL Enforcement Manual, Chapter 12, paragraph 25, mandates free exchange of information between DOL investigators and IRS. See, http://www.dol.gov/edsa/programs/oemanual/chap12.htm.This free exchange is not compelled by statute, and is uncontrolled, yet would it puts DOL in a position to obtain information IRS could not get under Leibman. Such an anomalous result cannot stand and makes a mockery of the attorney client privilege and work-product doctrines. All the REAL VEBA arrangements were instituted in anticipation of the litigation threatened in Notice 95-34..

Furthermore, courts have determined that an administrative agency cannot undermine the roles of the courts to regulate attorneys.[4] *New York Bar Ass'n v. F.T.C.*, 276 F. Supp.2d

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[4] The New York State Bar Association (NYSBA) and the American Bar Association (ABA) won an important victory in their consolidated actions challenging the Federal Trade Commission's (FTC) efforts to regulate the confidentiality practices of lawyers under the Gramm-Leach-Bliley Act (GLBA), when, on August 11, U.S. District Judge Reggie B. Walton denied the FTC's motion to dismiss. While technically only a threshold ruling, commentators almost universally agree that the analysis presented by Judge Walton's extensive memorandum opinion suggests that the ruling could prove dispositive. Judge Walton found "most convincing" the "absence of any explicit statement by Congress that it intended to legislate in an area already regulated by existing state regulatory schemes." This conclusion was important in light of his reading recent Supreme Court cases to say that Congress "does not alter the fundamental details of regulatory scheme in vague terms or ancillary provisions-it does not, one might say, hide elephants in mouseholes." Through such reasoning, he was "unable to conclude" that "Congress intended for the GBLA's privacy provisions to apply to attorneys who provide legal services in the fields of real estate settlement, tax-planning and tax-preparation." Recent Supreme Court decisions have limited ERISA pre-emption of state functions unless explicitly stated by Congress:

> "In trying to extrapolate congressional intent...we "have no choice" but to temper the assumption that" 'the ordinary meaning...accurately expresses the legislative purpose,' "id., at 740, 105 S. Ct. 2380 (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 105 S. Ct. 658, 83 L.Ed.2d 582 (1985)), with

110 (D.D.C. 2003). The DOL's power is no greater than the FTC power. Therefore, if it violates fundamental rules of federalism and separation of powers for the FTC to attempt to regulate attorneys, then the DOL, which depends on FTC statutes for its subpoena authority, cannot similarly regulate or command attorneys. As Judge Walton said:

> Implicit in the FTC's interpretation...is its assumption that Congress somehow delegated to the FTC the authority to regulate the ethical conduct of attorneys practicing in certain areas of the law with respect to how these attorneys keep their clients' information confidential and their dissemination of such information. The FTC comes to this conclusion even though there is no reference to attorneys in the [statute], but solely because... [of] several activities that are also performed by attorneys en-

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> the qualification " ' the historic police powers of the States were not [meant] to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' "*Travelers*, supra, at 655, 115 S. Ct. 1671 (quoting *Rice v. Santa Fe Elevator Corp.*) 331 U.S. 218, 230, 67S. Ct. 1146, 91 Led. 1447 (1947))."

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 363, 122 S. Ct. 2151, 2159 (2002); *NewYork State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins.Co.*, 514 U.S. 645, 656, 115 S. Ct. 1671, 131 L.Ed.2d 695 (1995),

There is nothing in ERISA manifesting any intent to supercede the authority of state Supreme Courts over attorneys. See, 29 USC sec. 1001 (Congressional statement of purpose and intent).

> gaged in the practice of law. This Court cannot agree that Congress would give the FTC jurisdiction to regulate the ethical conduct of attorneys through such a subtle grant of authority.

*Id.*at 115.

As demonstrated above, the Court must review the totality of the circumstances presented and not permit the process to be abused. *S.E.C. v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 124 (3d Cir. 1981). The Court should weigh the information requested, the litigation involved, and the fact that the DOL requests such information from a law firm. United the totality of the circumstances, and in light of recent clarifying precedent, the Court should deny the DOL's further attempts to obtain privileged documents before they even review documents present at Respondents' counsel's office.

Further, Respondents have appealed this matter. Rather then argue as to the finality, Respondents have requested that this Court certify the matter for appeal. Accordingly, this Court should stay this privilege matter and further production pending the disposition of the appeal.

IV. CONCLUSION

WHEREFORE, RESPONDENTS respectfully request that this Honorable Court DENY the Petition or in the alternative rule that 1) stay the privilege and relevancy issues pending appeal or 2) rule that all files possessed by the Lawyer Respondents are privileged and that any further production is not required pending review of the documents at the offices of Anderson Kill & Olick.

Dated: June 16, 2004

VIM- 1712
Virginia I. Miller (I.D. No. 85361)

CERTIFICATE OF SERVICE

I here by certify that at my direction a true and correct copy of the Supplemental Response to Petition to enforce Subpoena In An Investigation/Adversary Proceeding to PENN-MONT BENEFIT SERVICES, INC,; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; REGIONAL EMPLOYERS' ASSURANCE LEAGUES; JOHN J. KORESKO V.; DELAWARE VALLEY LEAGUE; and KORESKO & ASSOCIATES Dated February 4,2004; Memorandum of Law; and proposed order was served this date, via facsimile and hand delivery, as follows:

NATALIE APPETA
Staff Attorney, US DOL
The Curtis Center, Suite 630 East
170 S. Independence Mall West
Philadelphia, PA 19106-3317

Dated: June 16,2004 By: _____

Virginia I. Miller

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Elaine Chao, Secretary of
Labor, U.S. Department of Labor
Petitioner

Case No.: 04: Mc:00074 (Mam)

-vs.-

John J. Koresko, V.;
Regional Employers' Assurance Leagues;
Delaware Valley League;
Penn-Mont Benefit Services, Inc.;
and Koresko & Associates.
Respondents.

AFFIDAVIT OF VIRGINIA MILLER IN SUPPORT OF RESPONSE TO PETITION TOENFORCE ADMINISTRATIVE SUBPOENAS

THIRD AFFIDAVIT OF VIRGINIA I MILLER, ESQUIRE IN SUPPORT OF RESPONSE IN OPPOSITION TO ENFORCEMENT OF SUBPOENAS

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF PHILADELPHIA SS

I, Virginia I. Miller, Esquire, being duly sworn according to law, state the following:

1. I am an attorney at law admitted in New Jersey and Pennsylvania and employed by Anderson Kill & Olick, PC.

2. At all times relevant hereto, I was counsel to the Respondents in connection with the matters involved herein.

3. I am litigation counsel in the other matters concerning the Respondents herein.

4. Although we do not agree that the subpoenas are enforceable, we have been willing to cooperate to a degree in this matter. As such Respondents provided additional documents to the DOL. A true and correct copy of the second set of production bate-stamped PMDOL0149 through PMDOL0363 is attached hereto as Exhibit "A".

5. The produced documents in Ex. "A" and as previously produced (collectively "PRODUCED DOCUMENTS I and II" include the DVL VEBA plan documents, REAL VEBA plan documents, DVL VEBA trust documents, REAL VEBA trust documents, and other relevant communications for the Respondents.

6. Regarding document requests from the DOL, the Respondents have not provided a privilege log as the Respondents are awaiting the DOL to review thousands of pages of documents that are present at this law firm offices.

7. In view of the various motions filed with this court and letter sent to the DOL's attorneys, the DOL was aware of the privileges issues and refused to even address any privilege issues by stating that they were entitled to all information.

8. After receipt of the second set of PRODUCED DOCUMETS, the DOL did not contact the RESPONDENTS to view other documents at this law firm's offices, to meet and confer about further documents needed, or to discuss privilege issues.

9. Although we do not agree that the subpoenas are enforceable, Respondents would formally respond to the subpoenas as documented in Exhibit "B".

10. Regarding the privilege issues, Respondents have raised these issues in briefs filed with this Court and argument. These areas generally include: attorney-client privilege, HIPPA and FTC privacy rules, personal privacy issues, and work product.

11. The DOL has refused the Respondents' offer to provide further documents redacted.

12. Respondents and I have contacted certain representatives and members of REAL. These representatives and members do not wish their financial information, identity information, their medical information, and/or any other information to be provided to the DOL.

13. Respondents offered to cooperate to some extent. The DOL has met their cooperation with a refusal for anything short of "full compliance".

14. I am also counsel for an employer sponsored welfare benefit plan in another case pending in this Court, Arrow Drilling Co. v. Daniel Carpenter, No. 02-CV-9097. ("Arrow Action").

15. At all times relevant hereto, I was litigation counsel to plaintiffs in the matter filed on February 14, 2003, in the Circuit Court of Cook County, Illinois captioned, John Daniels, et al. v. STEP PLAN SERVICES, Inc., et al., No. 03-L-001917 ("STEP Action").

16. The Arrow Action and the STEP Action involve claims of breaches of fiduciary duties regarding multiple employer welfare arrangement ("MEWA") and multiple employer trusts ("MET").

17. In both the STEP Action and the Arrow Action, I forwarded copies of the complaints to the DOL. In both cases, I was informed by DOL personnel that DOL had no jurisdiction over such MEWAs and METs.

18. Even though a civil jury has found certain fiduciaries involved with the STEP Action and the Arrow Action to be sham corporations used for the alter ego's personal penchant for risky stock trading and liable for over $26 million for misappropriation of similar trust funds in *Gail Cahaly, et al. v. Benistar Prop. Exchange Trust Co., Inc. ("Benistar Property"); Molly Carpenter; Daniel Carpenter; Benistar Admin. Services, Inc. ("BASI"); Jane Doe Affiliates and Subsidiaries of Benistar Defendants and Jane Doe Entities controlled by Daniel Carpenter (including Benistar Ltd.*[1]*; Carpenter Financial Group; Benistar Employer Services Trust Corp. ("BESTCO));* Civ. No. 01-0116BLS2, Slip Op. September 23, 2003, the DL refused to intervene or to initiate an investigation regarding the STEP Action or the Arrow Action. I was informed that DOL does not jurisdiction and authority over such MEWAs and METs.

FURTHER AFFIANT SAYETH NAUGHT.

Dated: _____

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[1] Benistar Ltd. Is the parent company and controls the BENISTAR 419 PLAN and TRUST.

VIRGINIA I. MILLER, ESQUIRE

SUBSCRIBED AND SWORN
BEFORE ME THIS 16TH
DAY OF JUNE, 2004

_____

NOTARY PUBLIC

NOTARIAL SEAL

MICHELLE G. TODD, Notary Public City of Philadelphia, Phila. County My Commission Expires June 27, 2005